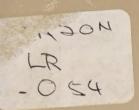
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ONTARIO LABOUR RELATIONS BOARD REPORTS

October 1991





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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the Ontario Labour Relations Board

Cited [1991] OLRB REP. OCTOBER

EDITOR: RON LEBI

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

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2904-90-OH Sandra Nicholls, Complainant v. Air Products Canada Ltd., Respondent

Discharge - Health and Safety - Smoking in the Workplace Act - Complainant alleging that she was constructively dismissed for seeking enforcement of Smoking in the Workplace Act and Occupational Health and Safety Act - Complainant also claiming that she later sought to rescind her resignation and continue her employment - Board concluding that complainant never asked to withdraw resignation and, further, that doctrine of constructive dismissal not applicable on facts of this case - Complainant dismissed

BEFORE: Janice Johnston, Vice-Chair, and Board Members W. H. Wightman and B. L. Armstrong.

APPEARANCES: Linda Vannucci-Santini for the complainant; Michael Failes and Michael Gass for the respondent.

DECISION OF JANICE JOHNSTON, VICE-CHAIR, AND BOARD MEMBER W. H. WIGHT-MAN: October 4, 1991

- 1. This is a complaint filed under section 24(2) of the *Occupational Health and Safety Act* (the "OHSA") in which the complainant, Sandra Nicholls, alleges that she has been dealt with by the respondent, Air Products Canada Ltd. ("Air products" or the "employer"), contrary to section 24(1) of the OHSA.
- 2. Ms. Nicholls took the position that she was dealt with by the respondent contrary to the provisions of sections 8, 2 and 5 of the *Smoking in the Workplace Act* (the "SWA") and because she acted in compliance with, or sought the enforcement of the SWA and the OHSA. Ms. Nicholls took the position that she was constructively dismissed by the respondent. Air Products took the position that Ms. Nicholls resigned from her employment.
- 3. The relevant provisions of the Occupational Health and Safety Act provide as follows:
 - 24.-(1) No employer or person acting on behalf of an employer shall,
 - (a) dismiss or threaten to dismiss a worker;
 - (b) discipline or suspend or threaten to discipline or suspend a worker;
 - (c) impose any penalty upon a worker; or
 - (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.

- (2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.
- (3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection

- (2), and section 89 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications, as if such section, except subsection (5), is enacted in and forms part of this Act.
- (4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), sections 102, 103, 106, 108 and 109 of the *Labour Relations Act* apply, with all necessary modifications.
- (5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

. . .

- (7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.
- 4. The relevant provisions of the *Smoking in the Workplace Act* provide:

. . .

- 2.-(1) No person shall smoke in an enclosed workplace.
- (2) Subsection (1) does not apply so as to prohibit smoking,
 - (a) in a smoking area designated by an employer under subsection 3(1);
 - (b) in an area used primarily by the public;
 - (c) in an area used primarily for lodging; or
 - (d) in a private dwelling.
- 3.-(1) An employer may designate one or more locations in an enclosed workplace as smoking areas.
- (2) The total space for designated smoking areas at an enclosed workplace shall not exceed 25 per cent of the total floor area of the enclosed workplace, exclusive of the places described in clauses 2(2)(b), (c) and (d).
- (3) An employer shall consult with the joint health and safety committee or the health and safety representative, if any, at the workplace before establishing a designated smoking area.
- (4) In subsection (3),

"health and safety representative" means a health and safety representative selected under the Occupational Health and Safety Act;

"joint health and safety committee" means a joint health and safety committee established under section 8 of the *Occupational Health and Safety Act* or a similar committee or arrangement, program or system in which employees participate.

. .

5.-(1) An employer shall make every reasonable effort to ensure that no person contravenes subsection 2(2).

(2) An employer shall make every reasonable effort to accommodate employees who request that they work in a place separate from a designated smoking area.

. . .

- 8.-(1) No employer or person acting on behalf of an employer,
 - (a) shall dismiss or threaten to dismiss an employee;
 - (b) shall discipline or suspend an employee or threaten to do so;
 - (c) shall impose a penalty upon an employee; or
 - (d) shall intimidate or coerce an employee,

because the employee has acted in accordance with or has sought the enforcement of this Act.

(2) Subsections 24(2) to (8) of the *Occupational Health and Safety Act* apply with necessary modifications when an employee complains that subsection (1) has been contravened.

. . .

- 5. At the commencement of the proceedings the respondent raised an objection as to the timeliness of the complaint. The subject matter of the complaint occurred in November, 1990 and the complaint was not filed until February 7, 1991. It was counsel for the respondent's position that this delay of approximately two months was unreasonable and that the Board should therefore dismiss this complaint. It was agreed that the Board would hear the evidence on the issue of delay and on the merits together and rule on both issues at the end of the case.
- 6. Ms. Nicholls was hired by Air Products on March 26, 1990 as an Accounts Receivable Clerk. She worked for the company until November 30, 1990.
- 7. The Board heard evidence from five witnesses. The respondent called three witnesses, Ms. Jill Martin, Ms. Tarja Loewen and Mr. Michael Gass. The complainant testified on her own behalf and Ms. Glenna Walkden was also called by counsel for the complainant to give evidence. In assessing the credibility of the various witnesses, the Board took into account the usual factors including: their ability to avoid the inclination to colour or tenor their evidence in accordance with their self interest; their general demeanour; their ability to recall the events; the clarity and consistency of their evidence when compared with that of other witnesses and subjected to the test of cross-examination; and most importantly, what was reasonably probable in all the circumstances.
- 8. The complainant testified that issues with regard to smoking in the workplace were very important to her, and that in her employment interviews it was her prime concern. The Board heard a great deal of evidence as to what was, or was not said at the complainant's employment interviews. After reviewing all of the evidence it is clear that the issue of smoking in the workplace was raised by the complainant and that the employer responded by explaining the company's policy. The policies and practices in existence at the company's premises with regard to smoking were accepted by the complainant. The complainant was hired, and worked without objection to the smoking in the workplace until July, 1990.
- 9. In July 1990, the complainant brought to the attention of management concerns with regard to the heating, ventilation and air conditioning system. In her opinion, the system was not functioning properly resulting in a build up of second hand smoke in her work area. These concerns were looked into, changes and repairs were made and there were no further complaints. It is important to note that the complainant at this time did not object to the company's policies and

procedures concerning smoking but was merely bringing to the attention of management a defect in the ventilation system.

10. There was no dispute that during the course of the complainant's employment at Air Products a smoking policy was in effect. The smoking policy was as follows:

To: ALL BRAMPTON EMPLOYEES Dept:

From: ROBIN A. SCOTT Dept./Ext.:

Date: 29 NOV 1989

Subject: SMOKING IN THE WORKPLACE

Effective January 1, 1990, our workplace, along with some 233,000 others throughout Ontario, will be required by the "Smoking In The Workplace Act" to restrict on-the-job smoking.

The purpose of this Act is to restrict workplace smoking by establishing minimum standards that limit exposure to tobacco smoke in the workplace.

To comply with this legislation, the following policies will be in effect on January 1, 1990.

- . Smoking will be banned in all areas of the workplace except those areas specifically designated as "smoking areas".
- . An employee who smokes may request their office/workstation be designated a smoking area. Such requests are to be made to Jim Tuff or Brian Greenshields. No such request will be denied unless Company or other legislative requirements prevent the area from being so designated.
- . All areas designated as smoking areas must clearly be identified with a sign. Desk-top signs will be provided to employees who have chosen to designate their office/workstation a smoking area.

In an attempt to accommodate all employees, every reasonable effort will be made by the Company to ensure a non-smoking employee is not adversely affected by a designated smoking area in close proximity to the non-smoker.

Remember, this policy comes into effect on January 1, 1990.

"Robin A. Scott"
Robin A. Scott

The complainant in her evidence did not take the position that Air Products was in violation of section three of the *Smoking in the Workplace Act*. There was no evidence before us to indicate that at any time the designated smoking areas exceeded twenty-five per cent of the total floor area.

11. Ms. Tarja Loewen was the complainant's supervisor. Ms. Loewen testified that on Friday, November 16, 1990 the complainant "came into my office and said that because of the smoking policy in the office she had to consider her own health and resign". Ms. Loewen also testified that Ms. Nicholls asked if she could be moved to another location in the office where the smoke would not bother her as much. Ms. Loewen indicated that she would speak to Mr. Michael Gass, the Personnel Manager, to see if there were any changes coming in the smoking policy or if there was another location they could move her to. Ms. Loewen spoke to Mr. Gass the same day. They concluded that as the complainant needed a smoke free work area there was no other location they could move her to. Mr. Gass testified that they reached this conclusion in part because an air quality survey, which had recently been conducted, indicated that the air quality was the same through-

out the building. The smokers were spread out throughout the building as the employees were grouped in functional areas (i.e. accounting, personnel etc.). Mr. Gass did however indicate that he would speak to the general manager about the smoking policy.

- Ms. Loewen testified that Mr. Gass got back to her later that same day and indicated that there would be no immediate changes to the smoking policy but that a committee would be formed to look at the issue. Ms. Loewen indicated that she got back to the complainant that afternoon and told her the results of her conversation with Mr. Gass. Ms. Loewen testified that she and the complainant then agreed that they would make the complainants notice "effective till she found another job or I found someone to replace her whichever occurred first". The date of her notice was to be November 16, 1990 but her last day worked was to be flexible.
- 13. Ms. Loewen next talked to the complainant on Wednesday, November 21, 1990. On that day the complainant delivered her letter of resignation. It read as follows:

Dear Tarja

As we discussed in your office Friday, Nov. 16/90, I feel compelled to resign my position with Air Products because of the smoke in the office.

The suggestions I put forth for re-locating my work area did not meet with your approval & since there is no smoke-free area, I must consider my own health.

As a result of the considerations, I have decided to terminate my employment Friday, November 30, 1990.

I deeply regret the necessity of this decision & trust you understand my position.

Yours truly "Sandra Nicholls"

- Ms. Loewen testified that during this discussion the complainant indicated that the agreement reached on Friday providing the complainant with flexibility concerning when her last day of work was no longer acceptable and that her last day would be November 30. The complainant at this time also put forward three suggestions as to where she could be moved. These were unacceptable to Ms. Loewen who felt that to move the complainant would not solve the problem, as there were no smoke free areas. The meeting ended when the complainant tendered her resignation in writing. Ms. Loewen testified that at no time did Ms. Nicholls attempt to rescind her resignation.
- Mr. Michael Gass testified that on Tuesday, November 20, Ms. Nicholls telephoned him and requested to meet with him. He agreed and they met later that day. Mr. Gass testified that she began the conversation by stating "I guess you're aware that I've resigned my employment with Air Products due to the smoking". She went on to discuss her concerns with regard to the smoking issue. They discussed the *Smoking in the Workplace Act*, the smoking policy and the new committee which was being put together to address the smoking issue. Mr. Gass testified that he showed her the memo which was about to be issued announcing the committee, and commented that she would be free to join it. Her response, according to Mr. Gass, was that she did not think the committee would do any good and she had no interest in sitting on it. They discussed a few other matters and she left his office. Mr. Gass testified that at no time did Ms. Nicholls attempt to rescind her resignation. He testified that he had no indication from her prior to receiving this complaint currently before the Board that she did not intend to, or want to quit.
- 15. The evidence given by Ms. Nicholls confirms that she met with Ms. Loewen On November 16, 1990. Ms. Nicholls testified that she talked to Ms. Loewen about the "possibility" of leav-

ing the employ of the respondent because she was having problems with the smoke in the work-place. Her evidence is consistent with that given by Ms. Loewen however, that they went on to strike a deal that she would stay until she found another position or Ms. Loewen located someone to fill her position. In addition, Ms. Nicholls confirmed that they discussed the possibility of changing her location but it was her position that Ms. Loewen refused to consider her suggestions. From this point on, the version of events as told by Ms. Nicholls is significantly different from the version related to the Board by Mr. Gass and Ms. Loewen. Ms. Nicholls testified that Ms. Loewen did not tell her she would speak to Mr. Gass nor did she report back to her after this alleged meeting.

- 16. Ms. Nicholls testified that when she found out about the smoking committee from another employee on Friday, November 16, 1990, she decided to meet with Mr. Gass. She testified that she spoke to him on Friday, November 16, 1990. She testified that Mr. Gass talked to her about the committee but that he did not "exactly" invite her to be on it. She testified that they discussed her concerns and that she made several suggestions to him concerning structural changes which could be made to the building to reduce the smoking in the workplace. Ms. Nicholls testified that she told Mr. Gass she would like to rescind her verbal resignation and he replied that she would have to discuss it with her supervisor Ms. Loewen.
- 17. Ms. Nicholls testified that she then approached Ms. Loewen and told her about her discussion with Mr. Gass. She testified that she told Ms. Loewen that she was excited about the changes being made and would like to rescind her resignation. The complainant testified that Ms. Loewen told her "that it was too late to decide to stay because the wheels had been put in motion to replace me". According to Ms. Nicholls this meeting also took place on Friday, November 16. Therefore Ms. Nicholls testified that she met twice with Ms. Loewen and once with Mr. Gass on the same day, November 16, 1990.
- 18. Ms. Nicholls testified that she next met with Ms. Loewen on November 21, 1990 and handed in her written resignation. She testified that she felt she should leave as she could not see anything else to do. In cross-examination Ms. Nicholls admitted that she had acquired copy of the SWA in April or May. She testified that she made a few calls (she could not remember to whom) and eventually decided not to do anything as she had been told the company was complying with the legislation. When questioned in cross-examination as to why she did not refer to her attempts to rescind her resignation, in her letter of resignation, Ms. Nicholls was initially quite evasive but ultimately stated that she "guessed" she was "not thinking". She could not put forward any reasonable explanation for this rather significant omission.
- The result in this case depends to a very large extent on whether the Board accepts as true the evidence of Ms. Nicholls or the evidence of Ms. Loewen and Mr. Gass. Ms. Nicholls acknowledged in her evidence that she quit but insists that she tried to rescind this in conversations with Mr. Gass and Ms. Loewen. Mr. Gass and Ms. Loewen both deny that Ms. Nicholls ever attempted to take back her resignation and thereby continue her employment. In applying the tests to determine credibility as set out earlier in our decision, we prefer the evidence of Mr. Gass and Ms. Loewen to that of Ms. Nicholls.
- 20. The Board accepts the evidence of Ms. Loewen and Mr. Gass as to when they met with the complainant, and what was discussed at those meetings. We conclude that Ms. Nicholls verbally resigned on November 16, 1990 and confirmed this in writing on November 21, 1990. We determine that even if Ms. Nicholls believes at this point that she attempted to rescind her resignation, she did not in fact try to do so in November, 1990. The evidence of Mr. Gass was quite clear on this matter and he was not moved from it in cross-examination. Ms. Loewen was not cross-ex-

amined by counsel for the complainant on this extremely crucial point. Her evidence that Ms. Nicholls did not attempt to rescind her resignation was not challenged in cross examination.

- 21. We conclude that the complainant resigned her employment with the respondent and did not attempt to rescind this resignation. There is no question of a reprisal as the respondent did not refuse to allow her to withdraw her resignation. She never asked to do so.
- Counsel for the respondent referred us to jurisprudence which recognizes that the act of quitting consists of both a subjective intention to leave one's employer, as well as some objective conduct consistent with that intention (see *Re Government of B.C. & B. C Government Employees Union* 17 LAC (2d) 42 and *Re Board of Education for the Borough of New York and CUPE Local* 922 26 LAC (2d) 182). In the circumstances of this case we have no difficulty in concluding that this test has been met.
- The complainant takes the position that she was constructively dismissed from her employment. The doctrine of constructive dismissal is not applicable based on the facts of this case. In order for it to apply, the employer must have unilaterally changed a term or condition of Ms. Nicholls employment. To amount to a constructive dismissal, the change must affect a fundamental term of the employment contract. Changing an employees remuneration, benefits, job content, job status, job duties or demoting the employee, are examples of situations which could lead to a finding of constructive dismissal. (See "Constructive dismissal" in *Employment Law Manual-Wrongful Dismissal, Human Rights and Employment Standards* Toronto: Carswell, 1990; Mole, Ellen E. "Constructive dismissal" in *Wrongful Dismissal Practice Manual*. Toronto, Butterworths, 1984 and Harris, David. "Constructive/dismissal/unilateral change." in *Wrongful Dismissal*. Don Mills, Ont.: DeBoo Publishers, 1990).
- After reviewing the evidence in this case the Board concludes that Ms. Nicholls was hired in March, 1990 after having been fully apprised of the terms and conditions of her employment, particularly with regard to the policies and practices concerning smoking in the workplace. She worked without complaint until July, 1990. At that time she raised concerns with regard to the heating ventilation and air conditioning system. This complaint was taken seriously by the respondent and the system was repaired. It is also important to remember that her complaint was not directed at the smoking policy or practices, but dealt with an equipment malfunction. The complainant did not raise any further concerns with regard to smoking in the workplace until November 16, 1990. She therefore worked under the same terms and conditions of employment with regard to smoking, for approximately eight months without complaint. On November 16, 1990 the complainant unilaterally determined that these terms and conditions were no longer suitable and wanted them changed. The employer looked at ways to accommodate her, but in light of her demands for a totally smoke free work environment, determined that accommodation was not possible. When Ms. Nicholls did not get the accommodation she sought, she quit. The employers inability to change the terms and conditions under which she had been working, not any positive act on their part, resulted in her tendering her resignation. The doctrine of constructive dismissal is therefore not applicable.
- 25. The only remaining issue to be dealt with is the objection raised by the respondent as to the timeliness of this complaint. Having dismissed the complaint on its merits it is unnecessary to decide this issue and we decline to do so. For the reasons outlined above we find that there has been no breach of section 24(1) of the OHSA nor has the company breached section 8, 2 or 5 of the SWA. This complaint is dismissed.

1. The majority has dismissed this complaint under section 24(1) of the *Occupational Health and Safety Act* (the "OHSA") based on their finding that the complainant resigned her employment and did not attempt to rescind such resignation. In addition, the majority held that the doctrine of constructive dismissal is not applicable to this case. With respect, I must dissent from both of these conclusions for the reasons which follow.

THE FACTS

2. In my view, the evidence in this case illustrated a course of action by the respondent which by design brought about the complainant's resignation. The complainant raised concerns about the problem of smoke in the workplace and how this problem adversely affected her health and safety. She tried to get the respondent to ameliorate the condition. The company did not respond to her concerns. As a result, the complainant felt compelled to resign her employment and verbally communicated her sentiment to her supervisor. The complainant subsequently learned through another employee about the respondent's plans to establish a smoking committee. This committee had as its mandate to look into and establish a smoking policy for the respondent's establishment. On learning of this change in policy, the complainant quite naturally sought to rescind her prior verbal resignation. The respondent denied this request. The complainant subsequently presented a letter of resignation.

THE LAW

- 3. The OHSA, R.S.O. 1980 ch. 321 is a remedial piece of legislation which holds among its objectives the protection of the health and safety of workers. In keeping with this objective, the Act provides a mechanism for workers to refuse work which they believe to be "likely to endanger" them. In addition, through section 24(1) of the OHSA employers are expressly prohibited from taking reprisals against workers who" act in compliance with the OHSA, or the regulations or an order made thereunder".
- 4. Rights, obligations and duties under the legislation stem from three sources, namely, the OHSA, the regulations or orders made pursuant to the OHSA or regulations. Article 131 of Regulation 692 reads as follows:

An industrial establishment shall be adequately ventilated by either natural or mechanical means such that the atmosphere does not endanger the health and safety of workers.

5. The effect of the above quoted article in the Regulation is to place a legal obligation on the respondent to, at a minimum, provide reasonable accommodation to employees in the complainant's position. This interpretation is consistent with the statutory requirement which requires that a remedial statute be given such large and liberal construction and interpretation "as will best ensure the attainment of the object of the OHSA according to its true intent, meaning and spirit." (*Interpretation Act*, s.10, R.S.O. 1980, ch.219)

THE DOCTRINE OF CONSTRUCTIVE DISMISSAL

6. It is well established that the breach of a fundamental term of the employment relationship by the employer will give rise to liability should the employee elect to treat that breach as a repudiation of the contract of employment. This form of action or claim is known as constructive dismissal. Demotion, geographic transfer and change in remuneration have typically been held to constitute constructive dismissal. (see for eg. *Kidd* v. *Southam Press Ltd*. (1983), 1 C.C.E.L. 167; *Nyveen* v. *Russel Food Equipment Ltd*. (1987), 19 C.C.E.L. 227)

7. The facts and circumstances that will give rise to a claim of constructive dismissal are not closed. This is especially true in light of the numerous statutory instruments that regulate the employment relationship. Indeed, it can and has been suggested that the breach of a statutory right such as the right not to be treated in a manner contrary to the Human Rights Code may well constitute constructive dismissal.(see *The Law of Wrongful Dismissal in Canada*, Canada Law Book Inc., 1985; Howard Levitt at p.63) The recent case of *Paitich v. Clark Institute of Psychiatry* (1988), 19 C.C.E.L. 105 (Ont.H.C.) affmd (1990) 30 C.C.E.L. 235 (Ont.C.A.) provides support for the view that the facts and circumstances that will give rise to constructive dismissal are not closed. The Supreme Court of Ontario held that an employee who had been exposed to harassment and unjustified criticism from his supervisor and denied an opportunity to transfer was constructively dismissed. The court based its finding of constructive dismissal on two grounds, namely, the abusive treatment of the supervisor and the failure of the employer to assist the plaintiff by relocating him. Clearly, this decision suggests that *any* breach by the employer of a major term of the employment relationship could constitute constructive dismissal.

CONCLUSION

8. Having found on the evidence that the respondent has refused to provide the reasonable accommodation called for by the statute and denied the complainant the opportunity to rescind her resignation, I would allow the complaint on the ground that the complainant was constructively dismissed by the respondent in contravention of section 24(1) of the OHSA.

2964-89-R Labourers' International Union of North America, Local 183, Applicant v. Belmont Property Management Ltd., Respondent

Certification - Construction Industry - Whether property management company operating business in construction industry, or whether its employees engaged in maintenance (and not repair) - Work performed by employees at one site held maintenance work, while work at second site held repair or construction work - Union entitled to be certified pursuant to construction industry provisions of the *Act* for the employees engaged in the construction part of the business - Board finding that, on application date, employer engaged in construction activities and employing "employees" within meaning of s.117(b) of the *Act* - Certificate issuing

BEFORE: Louisa M. Davie, Vice-Chair, and Board Members W. H. Wightman and R. R. Montague.

APPEARANCES: Craig Flood, Steve Wahl and Biagio Palazzolo for the applicant; Walter Thornton and Harry Nicholls for the respondent.

DECISION OF THE BOARD; October 22, 1991

1. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act* ("the Act"). In its application, the applicant (hereinafter referred to as "Labourers' Local 183" or "the union") seeks to acquire bargaining rights for, what may be described in short form, as its "standard" construction industry bargaining unit in applications filed pursuant to section 144(3) of the Act. In this application that bargaining unit consists of all construction labourers in the employ of the respondent:

in all sectors of the construction industry other than the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham,

save and except non-working foremen and persons above the rank of non-working foreman. In addition, the Labourers' Local 183 seek a clarity note that the bargaining unit includes all employees engaged in cement finishing, waterproofing, and restoration work.

2. The respondent (hereinafter referred to as "the employer" or "Belmont") asserts that it was not engaged in construction work on the application date. Counsel for Belmont submits that as Belmont was not an employer in the construction industry, the unit sought by the Labourers' Local 183 is not appropriate for collective bargaining. Consistent with that position the respondent proposes a bargaining unit described in the following terms:

All garage maintenance employees employed by the Respondent in the Municipality of Metropolitan Toronto, save and except foremen and persons above the rank of foreman and students employed during the school vacation period.

Counsel for Belmont also submits that in the event the Board determines that Belmont is an employer in the construction industry, and that the unit sought by the Labourers' Local 183 is appropriate, the Board ought not to grant the clarity note sought by the union as there is no evidence that Belmont employed persons engaged in cement finishing, waterproofing and restoration work on the application date.

- 3. Counsel for the union agrees with the description of the bargaining unit proposed by Belmont if the Board should determine that Belmont is not in fact an employer in the construction industry and that the application has been improperly brought pursuant to the construction industry provisions of the Act.
- 4. The employer filed a list of employees containing eight names on Schedule "A" and two names on Schedule "D". The parties are agreed that the list of employees remains the same regardless of whether the Board finds as appropriate the construction industry bargaining unit proposed by the Labourers' Local 183 or the non-construction bargaining unit agreed to by the parties if Belmont is found not to be an employer in the construction industry. If the Board accepts the respondent's assertion that it is engaged in maintenance and not repair and is therefore not an employer in the construction industry, only one of the two employees listed on Schedule "D" would meet the Board's usual 30-30 day rule employed in non-construction certification applications and be included for purposes of the "count". The applicant filed membership evidence on behalf of each of the eight employees whose name appears on Schedule "A". It is clear therefore that the applicant is numerically entitled to be certified to represent the employees of Belmont regardless of which of the two alternate bargaining unit descriptions the Board finds appropriate.
- 5. We turn then to address the evidence and submissions of the parties with respect to the primary issue raised in these proceedings, namely whether Belmont operates a business in the construction industry as defined in section 1(1)(f) and is therefore an employer within section 117(c) of the Act, or whether its employees are engaged in maintenance (and not repair) so that Belmont's operations do not meet the definition of "construction industry" found in section 1(1)(f) of the Act.
- 6. We heard the evidence of Paul McGrath, Harry Nicholls, Devon Cooper and John Roberts. With the exception of Devon Cooper the witnesses were credible and offered their testi-

mony in a candid and forthright manner. We found Mr. Cooper to be an unreliable witness. We found him to be argumentative, non-responsive and evasive in cross-examination and motivated by self-interest throughout his testimony. As a result, where his evidence conflicts with the evidence of the other witnesses, the evidence of the other witnesses is preferred.

- 7. Belmont, as its full legal name would suggest, is a property management company involved in all aspects of property management including the day to day operation and maintenance of buildings and the financial and accounting services associated with that. Belmont is paid a management fee calculated as a percentage against revenue for providing these services. Any costs incurred are charged directly back to the owner(s) of the buildings. Belmont does not provide its services to "outside parties" rather it is the property management company which is engaged to manage buildings in which the principals of Belmont have a controlling ownership interest. Belmont manages approximately 55 to 60 commercial properties and residential high-rise apartments. Belmont employs persons who work as cleaners or superintendents of the buildings. It also employs persons engaged in what it terms as "maintenance" work which it defines as anything to do with the interior and exterior of the buildings, including the boiler equipment, mechanical equipment, plastering, plumbing, roofing, landscaping, asphalting, and work in the garages.
- 8. With respect to this "maintenance" work, Belmont engages two separate and distinct groups of employees. Both groups are ultimately supervised by Paul McGrath the maintenance supervisor at the company. One group of employees works exclusively in the garages while the other performs all of the other "general maintenance" work. We use the term "general maintenance" for ease of reference only and as a means of distinguishing the two groups of employees. This application deals only with the former group of "garage employees". We heard very little evidence about the work performed by the "general maintenance" group. The evidence we did hear indicates that there are approximately 15 persons employed in that group. Work performed by the "general maintenance" division of Belmont may be contracted out. On the other hand, outside contractors are not used extensively to perform work in the garages.
- As part of its service Belmont routinely conducts an inspection of the buildings which it manages. On at least an annual basis, the principals and executives of Belmont, together with Mr. McGrath and the property manager of the particular site or building conduct a building inspection and walk through. The purpose of the walk through is to observe the state of the building and note any problems or potential problems. The walk through involves all interior and exterior parts of the building, including for example the hallways and garages. In addition, there are weekly maintenance and purchasing meetings at which decisions are made about what work is to be done and how that work is to be performed.
- More specifically and with respect to the parking garages the group attending at the site walks through the garage noting problems or potential problem areas such as "delaminations" or "spalling". A delamination is a rupture or crack in the concrete that has developed because of corrosion. Snow and road salt from the cars will fall off the cars onto the concrete and work its way into the concrete and steel. Salt is corrosive to the steel. Pressure exerted on the concrete as a result of this corrosion from within causes the concrete to erupt or delaminate. Spalling is similar to delamination. It is generally caused by the freeze/thaw cycle which may cause cracked blocks or flaking of concrete. Mr. McGrath also referred to block laitenance, a problem which he likened to "peeling paint".
- 11. With respect to the garages, at the weekly maintenance and purchasing meeting decisions are made about where the work needs to be done, the urgency of the work to be done and the cost associated with the work. In determining what work is to be done cost is an important fac-

- tor. Mr. McGrath stated in his evidence that "we try to do work before it becomes a major problem. In this way we can cut costs". Mr. McGrath indicated that safety was also a factor in determining work to be done. If a condition presents a hazard that work is prioritized accordingly. Finally, Mr. McGrath referred to the "urgency of the job itself". He stated "If we find a crack that we know potentially in two or three years the wall or slab will collapse we will try to repair it now to save that."
- 12. After a decision has been made at the weekly meeting about work to be done Mr. McGrath returns to the building site to prepare the job. To do that he marks red lines on problems areas to show "what sort of repairs [I'm] looking for and what I want to be removed and maintained.".
- 13. On the date of application the employees subject to this application for certification were working in the garages at two buildings referred to throughout this hearing as the "Gates of Bayview" site and "Carluke Crescent" site.
- 14. The Carluke site consisted of an underground parking garage in which employees worked on minor delaminations and other problems which could be rectified without major cost being incurred. Mr. McGrath testified that at the Carluke site we were "looking for cracks in the walls and in blocks, leakages, anything that could be repaired relatively easily.".
- 15. Work at the Carluke site performed by the employees involved taking out the loose mortar between blocks, removing and/or replacing blocks (some blocks were replaced with new blocks) and re-grouting these and other areas. All of this work was performed manually with the use of hammers, chisels, chipping hammers and fifteen pound jack hammers. The grouting involved the application of a hand mixed and hand trowelled cementitious product. While this work was performed those portions of the garage where employees were working were cordoned off and cars were prevented from parking in the area. The remainder of the garage however remained in operation.
- 16. The job at the Gates of Bayview was, in our view, significantly different. It involved what Mr. McGrath referred to as "slab delamination repair". It involved locating the problem and removing the top two or three inches of the concrete floor slab, preparing the patch and readying it for the pouring of new concrete.
- 17. Generally the area of the concrete slabs replaced was ten square feet or less. At the Gates of Bayview, however, there was at least one large area which consisted of 400 to 500 square feet. In total the top two or three inches of approximately 35 per cent of the garage was removed and re-poured with new concrete.
- 18. At the Gates of Bayview the removal of the top two or three inches of concrete slab was done by an outside contractor (Hydro Demolition Company). This contractor used a jet blaster to remove and/or break to pieces the concrete slabs. The contractor was engaged to expedite the job.
- 19. The employees of Belmont working at the Gates of Bayview job were involved in (a) removing from the garage the concrete which had been jet blasted; (b) cleaning up the surfaces jet blasted including miscellaneous chipping of the area and jack hammering the edges or areas missed by the jet blaster to ensure that the area was clean and ready for the concrete to be poured; (c) the pouring of new concrete. In addition and/or as part of this employees also looked for any additional delaminations or spalling, secured steel, cleaned or replaced rusty rebar (which causes delaminations), placed shoring or supports underneath the areas to be poured, and cut and placed ply-

wood for the concrete pour. The Belmont employees performed the pour and all jobs associated with finishing the cement poured.

- While the work was carried out portions of the garage were cordoned off. Cars were prevented from parking in those areas, although cars could continue to enter and exit the garage. At no time was the entire garage shut down. The witnesses estimated that anywhere from one-third to one-half of the garage was not used for the parking of cars while work was in progress. The cars displaced from the parking garage were either accommodated in other areas of the garage or alternatively at locations on the property outside the garage. The areas of the garage at which work was not carried out continued to be operational.
- 21. The work performed at both locations took a significant period of time which can be measured in terms of weeks rather than days. Mr. McGrath however testified that the work in the garages was never finished but was ongoing and is something that is "maintained all the time". As the work at one garage is completed employees are assigned work at another garage. As a result Belmont has never laid off any of its "garage" employees.
- The question whether work is "maintenance" (which is not construction work) or "repair" may at times be as easily answered as the familiar question about how many angels can dance on the head of a pin. There is no clear demarcation line between maintenance work and repair/construction work. Maintenance is not defined in the Act yet both the Board in its decisions (see, for example, *Tops Marina Motor Hotel*, 64 CLLC ¶16,004, *The Master Insulators of Ontario Inc.*, [1980] OLRB Rep. Oct. 1477, *Inscan Contractors (Ontario)*, [1986] OLRB Rep. May 640 and the other cases cited herein) and the labour relations community itself (see, for example, the General Presidents' Maintenance Agreement) have long recognized and accepted a distinction between maintenance work and construction work.
- 23. In *The Master Insulators*, *supra*, the Board enunciated a test designed to give some definition to the task of distinguishing "maintenance" work from "repair" work. "Repair" work, by reason of section 1(1)(f) of the Act is work which falls within the construction industry. In the *Master Insulators*, *supra*, the Board stated at paragraphs 28 and 29:
 - 28. With the exception of the work performed at the premises of Fearman and the work on a new emergency shower and minor work in a change house at Stelco, the work performed by the employers who were named in this complaint was essentially similar in nature. In our view, the work at the premises of Fearman, which involved an addition to an existing facility and involved both relocation of producing units and the expansion of existing capacity, was clearly new construction. Similarly, the work on the emergency shower and change house at Stelco was in an addition for the safety and comfort of Stelco's employees and represented new construction. This work is clearly within the industrial, commercial and institutional sector of the construction industry. The rest of the work referred to in the complaint was, for the most part, clearly work which sustained and maintained an operating facility and enabled that facility either to operate efficiently or to attain its designed or production capacity and is to be regarded as maintenance work. Maintenance work is to be distinguished from construction work which involves the addition to an existing facility or which will increase the designed or production capacity of an existing facility. However, in so far as there was work of new construction, which was purportedly done under the maintenance agreement, it was a violation of section 134a(1) of the Act.
 - 29. Maintenance work performed by the employers who were named in this complaint is in reality part and parcel of the production and maintenance operations of the industrial, clients for whom the work is performed. These industrial, clients may, and frequently do, perform their own maintenance work with their own employees who are included in their own industrial bargaining units. In the context of the work affected by this complaint "maintenance" is difficulty [sic] to distinguish from "repair". In our view, it is a question of the context of any given work and the degree of addition or subtraction of such work to an existing system or part of a system.

Where the work assists in preserving the functioning of a system or part of a system, such work is maintenance work. Where the work is necessary to restore a system or part of a system which has ceased to function or function economically, such work is repair work. "Maintenance" and "repair" are not mutually exclusive concepts, and lack of adequate maintenance will surely produce a situation where repair becomes inevitable. In our view, the performance of adequate and timely maintenance forestalls or reduces the requirement for repair.

[emphasis added]

- Although the test enunciated in that decision is easily stated (and has long been accepted) it is often difficult to apply to the facts of any case. This is evident from the circumstances before us where both parties relied upon the Board's decision in *The Master Insulators*, supra, to support their respective positions. Counsel for the employer argued that application of the test leads to a conclusion that the work is maintenance. Counsel for the union argues application of the test points to a conclusion the work is repair and therefore construction. As the Board stated in Levert & Associates Contracting Inc., [1989] OLRB Rep. June 630, at paragraph 12 when referring to the difference between maintenance and construction "... what the parties see generally as being one or the other appears to be very much in the eye of the beholder ... the Board, of course, must determine whether or not work characterized by a party as maintenance work is construction work for purposes of the Act, not for some more general purpose". In *The Master Insulators*, supra, a portion of the work was found to be construction while other parts of the work was found to be maintenance.
- In addition to *The Master Insulators*, supra, counsel for the Labourers 183 relied upon the decisions of the Board in Keith Holdsworth Consulting Limited, [1989] OLRB Rep. June 619, Briecan Construction Limited, [1989] OLRB Rep. May 417 and Overhead Door Company of Toronto Limited, [1974] OLRB Rep. July 482. Placing particular emphasis on the decision in Keith Holdsworth, supra, a case also involving work in parking garages, and applying The Master Insulators test, counsel for Labourers Local 183 asserted that the purpose of the work was to "restore a system or part of a system which had ceased to function or function economically.". The parking garages where Belmont employees work suffer from water damage which is evident on the surfaces worked upon. Those damaged areas are marked with red spray paint. The crews perform work to restore those damaged areas, to restore the waterproofing capabilities of the concrete, and to restore the full functioning capacity of the parking garages.
- On the other hand, counsel for Belmont relied upon *The Master Insulators*, supra, and Levert & Associates Contracting Inc., supra, in support of his position that the work involved was maintenance. Counsel distinguished Keith Holdsworth, supra, from the facts of this case. He submitted that unlike the company in Keith Holdsworth whose business consisted primarily of sealing cracks and fixing leaks in underground parking garages, Belmont is a property management company engaged in all aspects of the operation and maintenance of the buildings, including the financial and accounting services. Whereas the company in Keith Holdsworth, supra, was specifically engaged by property owners to fix the leaks in garages, Belmont's work in the garages is the result of an on-going relationship to maintain the buildings in which it holds a majority ownership interest. The buildings and garages are regularly inspected and work in the garages is part of an on-going. continuous program of maintenance. The garages continue to operate while the work is in progress. Work was not necessarily undertaken because the garage was leaking and needed to be "fixed" as was the case in Keith Holdsworth, supra, rather work was undertaken as part of the regular maintenance program and to prevent damage and deterioration.
- 27. We agree with the statements in each of the various Board decisions to which we were referred that, in applying the test enunciated in *The Master Insulators*, *supra*, the context in which the work takes place and the purpose of the work must be considered.

- With that context and purpose in mind we have determined that the work performed by the employees at the Carluke Crescent site is, on balance, maintenance work. The garage was functioning fully prior to the work being undertaken. However, as the garage had certain problem areas it was decided to remove or reinforce those areas. The work was not an addition to the garage and was not for the purpose of increasing its capacity. The work was done for the purpose of avoiding major problems in the future which would then result in increased costs to repair. It was work done to assist in preserving the functioning of the parking garage, and not work done for the purpose of restoring a system which had ceased to function economically.
- In our view, the facts as they relate to the Carluke Crescent site are distinguishable from *Keith Holdsworth*, *supra*. There is no evidence before us that there was any leakage at the Carluke Crescent site. This was not a situation where Belmont was attempting to restore the water-proofing capabilities of a concrete structure which was leaking. There wasn't any evidence that the parking garage system was so damaged that it needed to be "fixed". The waterproofing capabilities had not failed. The garage wasn't leaking. Rather, the work was patching and the replacement of a relatively small portion of concrete blocks (when viewed in context of the whole) undertaken as part of a regular and continuous preventative maintenance program designed for the primary purpose of sustaining and protecting an operating system to avert or preclude deterioration. The work was done to protect the structure from corrosion and thereby extend its useful life. Paraphrasing the language found in *The Master Insulators*, *supra*, the work was "timely maintenance [to forestall] or reduce the requirement for repair.".
- 30. On the other hand, we have determined that the work performed at the Gates of Bayview site is significantly different and is, on balance, repair or construction work. The work performed there went beyond timely maintenance to reduce the requirement for repair. Rather the lack of adequate maintenance produced a situation where approximately 35 per cent of the existing structure had to be repaired or re-surfaced.
- Large amounts of the existing concrete had to be demolished, taken out and replaced with new concrete. On occasion, new rebar had to be tied. The demolition jet blaster work performed by the outside contractor falls within the definition of construction work found in section 1(1)(f) of the Act. The work undertaken by the Belmont employees was part of that work, an extension of that work. The pouring of new concrete and all the work necessarily incidental to that pour (jack hammering edges, cleaning rebar, tying new rebar etc.) was work done to make that part of the garage operational again and went beyond mere routine or simple maintenance work. (See, *Quinard Limited*, [1982] OLRB Rep. July 1054 at paragraph 9). As stated in *The Master Insulators*, "maintenance" and "repair" are not "mutually exclusive concepts". Although the resurfacing of approximately 35 per cent of the garage at the Gates of Bayview could be described as general maintenance to parts of the garage, we are of the view the work is more properly characterized as general repairs of a structure.
- Belmont therefore is an employer which employs persons to perform both work which falls within the construction industry and work which does not. Where a person operates a business in the construction industry, (even if that business is only a part of the business activities) and the person employs "employees" within the meaning of section 117(b) of the Act to perform the work of that construction part of the business, a trade union is entitled to be certified pursuant to the construction industry provisions of the Act for the employees engaged in the construction part of the business. (See, for example, *Ridsdale Steel Fabricators Inc.*, [1987] OLRB Rep. Apr. 601 at paragraphs 9, 10 and 11.) Having regard to the totality of the evidence before us and the inferences which may reasonably be drawn from the evidence, we find that, on the date of application Bel-

mont was an employer in the construction industry, engaged in construction activities, employing persons who fell within the definition of employee in section 117(b) of the Act.

- We are satisfied that more than fifty-five per cent of the employees in the bargaining unit defined herein who were engaged in that construction work at the time the application was made, were members of the applicant on March 14, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
- 34. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
- 35. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act*.
- 36. The Board further finds that this application for certification does not relate to the industrial, commercial and institutional sector of the construction industry referred to in section 117(e) of the *Labour Relations Act*.
- 37. The Board further finds that all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

20.	A certificate will issue to the applicant.			

1233-90-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. E. & E. Seegmiller Limited, Respondent

Certification - Construction Industry - Union and employer disputing inclusion of 5 persons on list of employees for various reasons - Whether union or employer bearing onus with respect to list issues - Board asking whether it is more probable than not, on the evidence, that the person in dispute was an employee in the bargaining unit during the times material to the Board's consideration - Board concluding that 4 of 5 persons in dispute should be included on list of employees - Board directing representation vote

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members J. A. Rundle and D. A. Patterson.

APPEARANCES: John Moszynski and Kip Ryan for the applicant; Daniel Fryzuk for the respondent.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR AND BOARD MEMBER J. A. RUNDLE: October 16, 1991

- 1. The applicant is a trade union within the meaning of section 1(1)(p) of the Labour Relations Act and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1)(a) of the Act on September 30, 1983, that designated employee bargaining agency is the Labourers' International Union of North America, and the Labourers International Union of North America, Ontario Provincial District Council.
- 2. Further, the applicant is a council of trade unions within the meaning of section 1(1)(g) of the Act. Locals 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089 of the Labourers' International Union of North America are trade unions within the meaning of section 1(1)(p) of the Act and are constituent trade unions of the applicant which have vested the appropriate authority in it to enable the applicant to discharge the responsibilities of a bargaining agent within the meaning of section 10(1) of the Act.
- 3. This is an application for certification within the meaning of section 119 of the *Labour Relations Act* which has been brought pursuant to section 144(3) of the Act. As such, it does not relate to the industrial, commercial and institutional sector of the construction industry referred to in section 117(e) of the Act.
- 4. Having regard to the material before the Board, and pursuant to the provisions of sections 6(1) and 144(3) of the Act, the Board finds that all construction labourers in the employ of the respondent in all sectors of the construction industry, except the industrial, commercial and institutional sector, within a radius of 33 kilometres (approximately 20 miles) of the North Bay post office, save and except non-working foremen and persons above the rank of non-working foreman constitute a unit of employees of the respondent appropriate for collective bargaining.
- 5. The respondent filed a list of employees in the bargaining unit with twenty-one (21) names on it. Initially, the applicant challenge the inclusion of eleven of those persons included by the respondent on its list. The Board (differently constituted) authorized a Labour Relations Officer to inquire into and report to the Board with respect to the composition of the bargaining unit herein and the list of employees in it.
- 6. The Officer designated to conduct the inquiry authorized by the Board did so and reported to the Board. A copy of the Officer's report in that respect was also provided to each party. After reviewing the Officer's report, the applicant withdrew six of its challenges (i.e. with respect to Stephen Mathieu, Wilma Rose, David Adair, Muriel Gravelle, Paul Tremblay and David Shaw). This left five persons whose inclusion on the list of employees remained in dispute between the parties; namely, Thomas Brooks, Michael Laplante, Rick Chicquen, Robert Chicquen and Terrance Dolson.
- 7. Subsequently, a hearing was convened for the purpose of hearing the representations of the parties in that respect.
- 8. One of the noteworthy things about the evidence before the Board with respect to the list of employees in this case is the lack of it. At best, it is barely adequate for purposes of the Board's considerations. Nevertheless, the Board is constrained to make its determinations on the basis of the evidence placed before it and its labour relations expertise.
- 9. The applicant challenges the inclusion of Thomas Brooks on the list of employees on the basis that he exercises managerial authority and was not an employee within the meaning of the Act during the material times.

- 10. The evidence reveals that Brooks oversees and directs other employees on the job site in a general way. However, he appears to have no power to hire, fire, discipline, or otherwise directly affect the employment of other employees. Although he may provide information to management with respect to employees which might be used in decisions which affect them, Brooks appears to function as a mere conduit between management and other employees rather than as a part of management. In addition, Brooks regularly works "with the tools" alongside other bargaining unit employees.
- 11. Section 1(3)(b) of the Labour Relations Act provides that, subject to section 90 (which does not apply herein), no person shall be deemed to be an employee who, in the opinion of the Board, exercises managerial functions. Consequently, in applications for certification, the Board excludes persons employed at or above the lowest level of management from the bargaining unit. "Working foremen" are usually included in construction industry bargaining units unless they have a real overall responsibility for a construction job site or project, or can and do affect the employment status of persons in the bargaining unit. On the evidence before the Board, Thomas Brooks does not, in our opinion, exercise managerial functions within the meaning of section 1(3)(b) of the Act; nor is he perceived to do so by other employees. Indeed, if his duties and responsibilities were held to constitute such managerial functions, most working foremen would probably have to be excluded from construction industry bargaining units. We therefore find that Thomas Brooks should be included on the list of employees for purposes of this application.
- 12. The applicant challenged Michael Laplante on the basis that he was operating a "packer" on the date of application and was therefore not performing bargaining unit work. In the Board's experience, a "packer" is a machine commonly operated by a construction labourer and the operation of such a machine is commonly claimed by the applicant and its constituent trade unions as being the work of a construction labourer. The Board is therefore satisfied that Michael Laplante should be included on the list of employees in the bargaining unit.
- 13. The applicant also challenges the inclusion of Rick Chicquen and Robert Chicquen. It does so on the basis that the respondent, it asserts, has failed to discharge the onus on it to establish that they or either of them were employed in the bargaining unit during the material times.
- 14. At paragraph 21 of *PHI International Inc.* [1980] OLRB Rep. Dec. 1789, the Board explained that:
 - 21. On an application for certification, the Board is required to ascertain both the number of employees in the bargaining unit employed on the application date, and the number of employees who were members of the union on the "terminal date" fixed pursuant to section 92(2)(j) of the Act. An employer is required to file, in Form 51, a list of his employees. This list must be prepared under the instruction of a responsible company official who signs the list to verify its accuracy. In determining the number of employees in the bargaining unit the Board places primary reliance on this material, for the number and nature of an employer's employment relationships are matters which are often within its exclusive knowledge. The trade union seldom has detailed information in this regard, even though its right to certification will ultimately turn on establishing majority support among these employees. This is especially so in the construction industry where employment relationships are transitory, employment levels can fluctuate on a day-to-day basis, and an employer may be engaged on a number independent and geographically separate construction sites. Unless there is an interchange of employees, or functional interdependence among construction sites, the union may not have specific knowledge of the employer's employee complement. In these circumstances, we do not think it is unreasonable to require an employer to come forward an [sic] substantiate its claim that certain individuals were, indeed, "employees" on the application date. Frequently, a simple check of the employer's records will be all that is required. Sometimes, it may be necessary to entertain oral evidence. In either, case, however, we are satisfied that when an employer submits a list of indi-

viduals whom it claims are employees in the bargaining unit on the application date, it must be prepared to come forward, if challenged, and demonstrate that its list is accurate.

On the other hand, it has been said that the onus with respect to "list issues" lies with the party seeking to exclude a person from the list of employees in a bargaining unit.

- 15. There is merit to both views. On one hand, it is the employer which originally places persons on a list of employees and is in the best position to justify its decision to include or exclude a person from it. On the other hand, a trade union which asserts that a person should be off or on a list of employees should be able to provide some basis or justification for adopting its position in that respect.
- In our view, however, questions such as this are best decided by answering the following question: "Is it more probable than not, on the evidence, that the person in dispute was an employee in the bargaining unit during the times material to the Board's considerations?". Fashioning an answer to this question may well involve various onuses, but the answer will ultimately depend upon an assessment of the evidence before the Board.
- 17. In the construction industry, the Board has been consistently applying what has come to be known as the Gilvesy test. This test first enunciated in *E. & E. Seegmiller Limited* [1987] OLRB Rep. Jan. 41 at para. 23 as follows:
 - 23. In making our determination with respect to Mr. Murray, we considered the work performed by the persons whose status was in dispute in these proceedings both on the date of application and during a period prior to that date. However, it appears to us that recourse to a "repre- sentative period" has made the certification process in the construction industry less consistent, certain, and expeditious than it might be. The use of any such period is inconsistent with the requirement that a person be both employed by the respondent and at work on the date of application. The very nature of a "representative period" is such that its length will vary accordingly to the circumstances of the particular application and creates uncertainty. Looking to a "representative period" overlooks the fact that once a trade union has been certified as bargaining agent for a bargaining unit of employees of an employer in the construction industry, any collective agreement to which that employer becomes bound, whether a provincial agreement or not, will apply to persons doing the work covered by that agreement. Consequently, whether or not an employee is covered by a particular collective agreement and represented by a particular bargaining agent depends on the work that s/he is doing at the time and is in no way dependent upon the work that s/he performed during any previous period. Further, the use of a "representative period" had tended to result in protracted and expensive proceedings before the Board. Because it is important that the Board's policies and tests be consistent and create as certain, equitable, and expeditious a means as possible for ascertaining which persons are in a bargaining unit, and having regard to the nature of applications for certification in the construction industry, we take the view that the Board should eliminate its use of a "representative period" and restrict itself to the following criteria:
 - (a) whether the person was employed by the respondent and at work on the date of application; and
 - (b) if so, the work that that person spent the majority of his/her time doing on the date of application or
 - (c) where there is no conclusive evidence with respect to the work that the employee performed on the date of application, any other relevant factor, including the primary reason for hire.

(see also Gilvesy Enterprises Inc. [1987] OLRB Rep. Feb. 220).

18. In this case, there is no cogent conclusive evidence with respect to what work either

Rick Chicquen or Robert Chicquen performed on the date of application herein. The evidence does indicate that they were present on the job site, even if briefly, and that they were paid two hours wages for that day. The evidence is clear that they both were hired as construction labourers and worked for the respondent only as construction labourers both before and after the date of application. On the basis of the evidence as a whole, we are satisfied that it is more probable than not that Rick Chicquen and Robert Chicquen were employees in the bargaining unit on the date of application and that they should therefore be included on the list of employees.

- 19. Terrance Dolson is also challenged by the applicant on the basis that he was not performing bargaining unit work on the date of application. Again, the applicant asserts that the respondent has failed to discharge the onus on it to establish that he was.
- Dolson was the only person challenged who did not testify before the Officer. The Officer's report indicates that he could not be located. There is in fact precious little evidence with respect to Dolson before the Board. Although there is some reference to him in the testimony of the persons examined in the course of the Officer's inquiry, there is nothing in it suggests, in any cogent way, that Dolson was at work in the bargaining unit on the date of application. The only evidence that he was is a "Daily Cost Sheet" submitted by the respondent which, standing alone as it does, is insufficient to satisfy us that it is more likely than not that Dolson was at work in the bargaining unit on the date of application. Accordingly, he should not be included on the list of employees.
- 21. In the result, having regard to the materials filed and the Board's determination as aforesaid, the Board finds that there were 20 employees in the bargaining unit at the time this application was made.
- 22. All ten of the pieces of documentary evidence of membership filed by the applicant satisfy the requirements of Act in that respect. The applicant also filed the requisite Form 80, Declaration Concerning Membership Documents, Construction Industry, attesting to the adequacy and sufficiency of its membership evidence.
- On the basis of the evidence before it, the Board is satisfied that not less than forty-five per cent and not more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of one or other of the constituent trade unions of the applicant and therefore, pursuant to section 10(3) of the Act, are therefore deemed to be members of the applicant on August 24, 1990, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the Act, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.
- 24. The Board therefore directs that a representation vote be taken of employees in the bargaining unit found by the Board as aforesaid. All those employed in the bargaining unit on the date hereof who are so employed on the date the vote is taken will be eligible to vote. (The attention of the parties in that respect is directed to *City Plumbing (Kitchener) Limited* [1987] OLRB Rep. June. 810.)
- 25. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.
- 26. The matter is referred to the Registrar.

- 1. I dissent from the majority decision.
- 2. I am at odds with the majority's findings regarding the employee status of Rich Chicquen and Robert Chicquen. I would not have found either of these witnesses to be employees on the date of the applicant's application for certification. I am not convinced nor did I find their evidence persuasive. Neither Rick or Robert Chicquen in closer examination by counsel for the union could remember anything, even remotely about the day in question. The employer did not provide any additional evidence during the Board inquiry which could have clarified their respective duties and responsibilities on the date in question.
- 3. I believe that the Board's jurisprudence is very clear in setting out where the onus lays in such cases. I feel that E. & E. Seegmiller Limited has not discharged its onus as per the test the Board has adopted over the years. In *PHI International Inc.*, (hereinafter referred as "PHI"), [1980] OLRB Rep. Dec. 1789, the Board stated at paragraph 11 of its decision:

...It is the parties themselves who are in the best position to understand the business or factual context in which the employee status dispute arises, and it is the parties, therefore, who must bear the primary burden of adducing evidence to support their positions, or risk the possibility that if they do not lead such evidence, the Board will draw inferences adverse to their position from the evidence which is available. We do not think the officer has any obligation to "call" any evidence or ask any particular questions although frequently he will do so in order to clarify and expedite matters, and ensure that relevant evidence is before the Board. Certainly, he has no obligation to conduct an examination of a witness of which he knows nothing whatsoever. The present circumstances provide a case in point, for here, neither the union, nor the Board officer, had any knowledge of the background of the witness, or the evidence which the respondent Farlo claimed might be material. These facts were exclusively within the knowledge of the respondent itself, and in our view it was entirely appropriate for the officer to turn to the respondent to call that evidence.

In the instant case, I believe that the evidence the employer chose to call in support of its assertion falls short of exactly what the Board expects in such cases and is laid out in PHI.

4. I would also draw on paragraph 17 of the PHI decision to further support my opinion.

For these three individuals there are not even the minimal employment records which are available for Ponte, DiLabio and the other employees on the list. There are no unemployment insurance records, TD-1 forms or separation certificates. There is only an unsigned typewritten document dated April 25, 1979 indicating that work was done by the three persons at 220 and 230 Woolner Road. However, although this document was produced, no one from the respondent(s) came forward to explain what it was, whether it is the kind of document which is kept in the ordinary course of business, whether this is the way the respondent(s) document casual labourers, why the space for a signature is not filled in, who prepared the document, who keeps documents of this kind and from what record or sequence of records it has been extracted. All of these things might have been of some assistance to the Board in determining what weight to be ascribed to this document. As it is, in the absence of such information, the Board is satisfied it should give this particular document no weight.

I believe the same analysis is applicable in this case. In the exhibits filed by the respondent the daily cost sheets where both Robert and Rick Chicquen's names are listed for the date in question on page 3 of the cost sheets. This particular cost sheet although it signifies the same date, job site, job number etc. on pages 79 and 80, the page 81 is signed by foreman no. 13927, and pages 79 and 80 were signed by Mason, a different foreman. During the Board inquiry the respondent did not offer up any evidence from any of the foreman who signed the cost sheets. I believe the only inference the Board should draw from this lack of evidence is an adverse inference and thus the documents filed should be given no weight.

5. It is this Board member's opinion that the onus falls directly in the lap of the respondent, not the applicant. In paragraph 21 of the PHI case, the Board stated that:

On an application for certification, the Board is required to ascertain both the number of employees in the bargaining unit employed on the application date, and the number of employees who were members of the union on the "terminal date" fixed pursuant to section 92(2)(j) of the Act. An employer is required to file, in Form 51, a list of his employees. This list must be prepared under the instruction of a responsible company official who signs the list to verify its accuracy. In determining the number of employees in the bargaining unit the Board places primary reliance on this material, for the number and nature of an employer's employment relationships are matters which are often within its exclusive knowledge. The trade union seldom has detailed information in this regard, even though its right to certification will ultimately turn on establishing majority support among these employees. This is especially so in the construction industry where employment relationships are transitory, employment levels can fluctuate on a day-to-day basis, and an employer may be engaged on a number of independent and geographically separate construction sites. Unless there is an interchange of employees, or functional interdependence among construction sites, the union may not have specific knowledge of the employer's employee complement. In these circumstances, we do not think it is unreasonable to require an employer to come forward and substantiate its claim that certain individuals were, indeed, "employees" on the application date. Frequently, a simple check of the employer's records will be all that is required. Sometimes, it may be necessary to entertain oral evidence. In either, case, however, we are satisfied that when an employer submits a list of individuals whom it claims are employees in the bargaining unit on the application date, it must be prepared to come forward, if challenged, and demonstrate that its list is accurate.

6. In closing, I would not have found either Rick or Robert Chicquen to be employees employed on the date of the application for certification by the respondent employer. I would not have included either Rick or Robert Chicquen on the list of employees. Therefore, I would have issued a certificate to the applicant.

0913-89-U; 0914-89-R Ontario Nurses' Association, Complainant/Applicant v. Kitchener-Waterloo Hospital, Respondent v. Group of Employees, Objectors

Bargaining Unit - Sale of a Business - Unfair Labour Practice - As part of rationalization plan, St. Mary's Hospital closing and Kitchener-Waterloo Hospital expanding respective obstetrics and paediatric units - ONA representing nurses at St. Mary's - Kitchener-Waterloo nurses unrepresented - Kitchener-Waterloo initially prepared to give hiring preference to St. Mary's nurses but later altering position - Board finding sale of a business, but declaring ONA not the bargaining agent and collective agreement no longer binding - Board indicating that the reasons for having made particular decisions in the structuring of a transaction may well be relevant in determining whether a sale occurred - Decision by Kitchener-Waterloo not to give preference to St. Mary's nurses in breach of s.66 of the *Act* - Board reserving with respect to other alleged unfair labour practices

BEFORE: Robert Herman, Vice-Chair, and Board Members J. A. Ronson and C. McDonald.

APPEARANCES: David Nicholson, Donna Hicks, Lynelle Purdy, N. Eveleigh for the applicant; T. F. Storie, Don McCroom, Judith Skelton Green, Len Kurt for the respondent; T. J. Billo, Doris Harper, Myrna Logan for the objectors.

DECISION OF R. HERMAN, VICE-CHAIR, AND BOARD MEMBER, C. McDONALD; October 15, 1991

- 1. File 0914-89-R is an application pursuant to section 63 of the *Labour Relations Act*. File No. 0913-89-U is a related complaint under section 89 of the Act.
- Two hospitals in the Kitchener-Waterloo area negotiated a rationalization plan (the "Plan") whereby certain services previously offered by both would only be offered in the future by one or the other of the hospitals. Part of the Plan included provisions whereby the paediatrics and obstetrics services that had previously been offered at both hospitals would no longer be provided at St. Mary's General Hospital ("St. Mary's"), and only Kitchener-Waterloo Hospital ("Kitchener-Waterloo" or "The Hospital") would continue to provide such services. This "rationalization" of services would cause the paediatrics and obstetrics units at Kitchener-Waterloo Hospital to expand and would require additional nurses in those units. The applicant Ontario Nurses Association ("O.N.A.") has bargaining rights at St. Mary's representing both a full-time and a parttime bargaining unit of nurses. The nurses at Kitchener-Waterloo are unrepresented. The applicant applied under section 63 and 89 of the Act, alleging that the rationalization of services involving the "transfer" of the paediatrics and obstetrics services to Kitchener-Waterloo, around July 1, 1989, was a "sale" within the meaning of section 63, and alleging that the details of the rationalization Plan and decisions with respect to its implementation were based in part on a scheme by the respondent Kitchener-Waterloo to structure the transaction so that it would not look like a sale or transfer within the meaning of section 63, thereby wrongly attempting to undermine the bargaining rights of the applicant and the rights of nurses that it represents at St. Mary's. O.N.A. argues that a "transfer" of the paediatrics and obstetrics units from St. Mary's to Kitchener-Waterloo has occurred and that the St. Mary's nurses in these units were wrongfully deprived of their preferential rights to secure positions in the paediatrics and obstetrics units at Kitchener-Waterloo.
- 3. The applications were filed on July 7, 1989. The first day of hearing was August 21, 1989. At the request of the parties, the hearing dates were set in accordance with their schedules and on their agreement. The applications took approximately fifteen hearing days, concluding on April 2, 1991. The Board heard evidence from only two witnesses. Called on behalf of the Hospital was Judith Skelton-Green, the Vice-President of Patient Services at Kitchener-Waterloo. She was on the witness stand for nine days of hearing, and was subject to cross-examination for all nine of those days. Because of the hearing schedule, those nine days stretched from March, 1990 until October, 1990. At the conclusion of her evidence, the applicant agreed that the Hospital had discharged its onus pursuant to section 63(13) of the Act. The only other witness was Doris Harper, a part-time nurse in the paediatrics department at Kitchener-Waterloo, and one of the representatives of those nurses at Kitchener-Waterloo who participated in this proceeding in opposition to the application. O.N.A. called no evidence.

Evidentiary Matters

- 4. There were a number of matters dealt with by the Board during the hearings, a few of which we set out here. The section 63 application alleges that a "transfer" occurred with respect to the rationalization of the obstetrics and paediatrics departments from St. Mary's to Kitchener-Waterloo. But the changes in these two departments were only some of the changes resulting from and forming part of the Plan. The Board therefore heard evidence about the entire realignment or rationalization of services.
- 5. There was a dispute over production of documents in possession of the Hospital. At the time the dispute arose, the Board was hearing only the section 63 application (in a subsequent

decision dated August 13, 1990 the Board, by majority decision, ruled that the section 89 complaint would be heard together with the section 63 application). A few background facts are necessary to understand the dispute and the Board's ruling. The rationalization Plan was drawn up and approved in early May, 1989. This Plan consisted only of the general outlines of the realignment agreed to between the two hospitals. After the adoption of the Plan, its details and implementation terms and timetable remained to be worked out. Kitchener-Waterloo accomplished this by establishing committees, or by utilizing existing ones, which would discuss the myriad details of the realignment, make decisions or recommendations as to the appropriate steps to take, and monitor and evaluate the continuing execution of the changes and operation of the expanded or changed services. The actual implementation took place in phases or steps over many months following the adoption in May of the rationalization Plan. The applicant sought production of Minutes of meetings at which matters concerning the implementation of the rationalization Plan were discussed. The majority of the Board ruled, Board Member Ronson dissenting, that the documents were arguably relevant, since they dealt with the details of and the actual implementation of the rationalization Plan reached on May 9, 1989. In the majority's view, the events that had occurred after the adoption of the plan on May 9, 1989 were relevant, since they dealt with how the rationalization, part of which was asserted to be a section 63 transfer, actually had occurred. The Plan was only an agreement describing the general parameters of the changes. In assessing whether a "transfer" had occurred, it was relevant to lead evidence of the actual changes, quite apart from the document containing the outline. ONA asserted that a sale occurred when the actual changes were implemented, around July, 1989. Since these facts were at the least arguably relevant under section 63, the applicant was entitled to see the Minutes containing this evidence. Accordingly, the majority of the Board directed that the documents were to be disclosed to the applicant.

- 6. Board Member Ronson would not have directed disclosure of the documents, since in his view they were arguably relevant only to the section 89 complaint, which was not at that time being heard by the Board. In his view, the section 63 transaction alleged was the rationalization Plan of May 9, 1989, and only documents concerning that particular plan were arguably relevant. To admit or direct disclosure of the documents sought by the applicant would be to allow the applicant to engage in a fishing expedition, in support of its unfair labour practice complaint. Minutes of meetings dealing with the implementation of the decision made on May 9, 1989, would not, in Board Member Ronson's opinion, assist the Board in concluding whether a sale had taken place as of May 9, 1989.
- After the Hospital had produced the documents as directed, it objected to any of them being entered in evidence, on the grounds that they were not arguably relevant. For similar reasons as expressed in the direction to produce the documents, the majority of the Board ruled that the documents were admissible as they were arguably relevant. The transaction in question was not only the Plan agreed to as of May 9, 1989, nor did that document fully describe it. Many matters which were arguably relevant to whether a "sale" had occurred remained to be decided by the hospitals; for example, the timetable of when the various services would be stopped at particular hospitals, the question of whether employees should "transfer" or not, the question of whether equipment would move from one hospital to the other, the question of when patients would be moved or redirected from one hospital to the other. All these questions were resolved only after the adoption of the general Plan in May, 1989. The answers to these questions were clearly relevant to understanding the details and nature of the actual transaction that ultimately occurred.
- 8. During cross-examination by counsel for O.N.A. of Ms. Skelton-Green, the parties agreed to defer certain evidence. They agreed that the Board should determine whether a "sale" had occurred, and the consequential issues, such as questions of intermingling, the appropriate bargaining unit, the voting constituency, and whether to direct a vote. However, they also agreed

that evidence of whether any particular St. Mary's nurse had suffered a loss, and if so, the quantum thereof, ought to be deferred, until necessary, with the Board remaining seized. More specifically, the questions of heads of loss and quantum referred to in paragraphs 8, 9 and 10 of the "Remedies" part of the complaint were to be deferred, except for the question of whether any St. Mary's nurses should be "reinstated" to Kitchener-Waterloo, either because of a finding that a "sale" had occurred or because the Hospital had committed an unfair labour practice. The Board accepted their agreement to defer certain evidence and to remain seized thereof.

- 9. At the conclusion of the evidence, the parties were agreed that final submissions should be in writing. The proceedings were adjourned for written submissions on that basis. Upon receipt of the written submissions, however, it appeared that perhaps the parties were not of the same view as to the terms of the deferral of evidence. Accordingly, one further hearing date took place, at which the parties addressed the question of the nature and effect of their previous agreement to defer the evidence, and of the Board's endorsement of their agreement.
- The parties in the result were in agreement that the Board had before it all the evidence 10. upon which it was to decide whether or not a sale had occurred, and if so, the consequential issues: for example, if intermingling had occurred, what the result of such intermingling ought to be, including the questions of the appropriate bargaining unit and voting constituency, if any. The parties agreed that the Board was to remain seized with respect to the remedies part of the union's application, and as to whether any loss had been incurred by St. Mary's nurses, and if so, the quantum of loss. The Board was to decide, on the evidence before it, whether to order the reinstatement of St. Mary's nurses to the Kitchener-Waterloo obstetrics and paediatrics departments. In effect, the parties agreed to defer evidence concerning type and quantum of loss with respect to the section 89 complaint, but not with respect to the section 63 issues to be decided. The parties were further agreed that the deferral of evidence agreement included evidence with respect to, for example, whether any of the St. Mary's nurses had moved from the full-time bargaining unit to the part-time bargaining unit at St. Mary's, whether any of them had suffered reduced hours, or whether any of them had quit because they did not want to work in other than the obstetric or paediatric services at St. Mary's, as a result of the rationalization. The parties also agreed that no nurse at St. Mary's had been laid off, in the sense of having lost a job and being out on the street, as a result of the rationalization.

THE FACTS

- Kitchener-Waterloo Hospital and St. Mary's General Hospital are the two major hospitals in the Kitchener-Waterloo region. Both institutions have for many years provided a wide range of hospital services to the communities which they serve. For over ten years, the two hospitals have been engaged in discussions regarding the duplication of certain of their hospital services, and attempts to more efficiently rationalize the services they provide. Indeed, prior to the rationalization Plan in question, a number of previous plans of rationalization or realignment had been jointly agreed to by the two hospitals. The most recent, in October, 1987, had been submitted, as required, to the Ministry of Health for its approval.
- The hospitals co-operated in other respects as well. Medical privileges were granted to doctors for both institutions. When doctors applied for privileges at either hospital, they were automatically considered for privileges at both institutions, by a Joint Credentials Committee. Similarly, when a doctor resigned his or her privileges, the Joint Credentials Committee usually received the resignation request, and usually applied the resignation to both hospitals. It was a notification of future resignation by certain of these doctors that prompted the instant rationalization Plan. The Ministry of Health had not responded to the October, 1987 realignment scheme

agreed to between the hospitals. The obstetricians had become increasingly frustrated with this state of limbo, and were discussing unilateral action to force a response. Kitchener-Waterloo was also experiencing serious budget problems. On April 17, 1989, for reasons unrelated to the subsequently agreed to rationalization scheme, Kitchener-Waterloo made the decision to close 43 beds in its gynaecological and medical-surgical units, with the result that approximately 51 registered nurses in those services were to be laid off. Around the same time, the obstetricians, who had privileges at both hospitals, announced that they would be withdrawing their services from the St. Mary's obstetrics department, effective July 1, 1989.

- Kitchener-Waterloo had to contend with both these problems simultaneously. News of the pending withdrawal of services by the obstetricians was the impetus for the two hospitals to devise a new realignment plan. The hospitals engaged in a period of frantic activity, holding meetings and discussions in an effort to arrive at a mutually acceptable realignment plan, one that would respond to the needs of the hospitals and the decision of the obstetricians to withdraw their services, while at the same time would likely be approved, as required, by the District Health Council and the Ministry of Health. During this period, on April 21, 1989, Kitchener-Waterloo senior staff met with the nurses in its gynaecological and medical-surgical units, to respond to their concerns about the layoffs. Participants at the meeting were also aware of the drive to formulate a rationalization plan between the two hospitals. There was general discussion with the nurses about the nature of the bed closings and the number of the expected layoffs. The Hospital told the nurses that it would try to take care of them. Management was questioned about the rights of the nurses who were going to be laid off if a rationalization plan was subsequently adopted. The nurses were told that they would be entitled to bid on new positions, subject to existing policies. They were not advised that they would be given preferential treatment over nurses affected by the realignment scheme.
- During the first week of May, 1989, the two hospitals continued their joint discussions, under the auspices of the District Health Council, and they arrived at a mutually acceptable rationalization Plan. Several principles directed the hospitals and the District Health Council in the development of this Plan. Because of the nature of funding in the hospital sector (at that time), it was clear that the Ministry of Health would not approve any plan that involved any increase in the total hospital beds in the community, nor any plan that involved extra financial commitments on the Ministry's behalf to either of the hospitals. On May 9, 1989, the two hospitals and the District Health Council signed their respective agreement to a Plan to realign services between the two hospitals. It was this Plan that was the foundation of the transaction alleged to have been a "transfer" within the meaning of section 63.
- 15. The Plan itself described the strategic direction of the hospitals and the District Health Council, and explained the urgency of the current dilemma. It noted the resignations submitted by the obstetricians from the medical staff of St. Mary's, and the need to more efficiently rationalize hospital services. It also provided the overall structure of the realignment scheme. As the Plan stated:

PLAN

On July, 1, 1989 or as soon as possible:

KWH will provide all obstetric, gynaecology, paediatric and otolaryngological (E.N.T.) programs.

SMGH will provide a comparable amount of additional medical programs including rheumatology, endocrinology, acute care geriatric medicine; and surgical programs including ophthalmology, orthopaedics, general, urology, vascular and plastics.

All parties to this agreement support the fact that neither hospital will be adversely affected, financially or otherwise, by this service realignment. We encourage all parties including the Ministry of Health to implement this plan accordingly.

A previous study by the Waterloo and Wellington-Dufferin District Health Councils indicated a need for an additional C.T. scanner. Therefore, as part of this service realignment and as soon as possible, SMGH will purchase a C.T. scanner to provide proper service support to the medical and surgical programs offered by SMGH. Specific access arrangements will be developed to ensure access by Cambridge and Wellington County.

KWH will make available the space on 7ABC providing a much improved environment for dial-vsis services.

Ambulance-hospital interface will a facilitated in the Kitchener Hospital Centre by a central bed registry (trial in place). By 1990 the Waterloo Region District Health Council, together with KWH and SMGH, will present to the Ministry of Health an assessment of each hospital's physical plant requirements based on this service realignment.

CONCLUSION

Overall, there will be no reduction in service to the community nor will increased operating dollars be requested by either hospital. Patient throughput will be maximized by emphasizing more surgery on an out-patient, day surgery and reduced length of stay basis. Programs in acute care medicine will be supported by an ambulatory and outpatient emphasis. To minimize extended lengths of stay, other hospitals will offer transitional care programs.

Trustees will continue to support policies and practices which minimize length of stay and manage human and fixed resources to contribute to effective patient outcome and throughput. This realignment of services will be monitored so that backlogs or excessive service volumes do not develop in either hospital.

Both KWH and SMGH and the Waterloo Region District Health Council give assent to this plan.

All parties indicated below encourage timely consideration and support from the Minister of Health in order to proceed with implementation and further collaboration with community-based services as soon as possible.

- On May 15, 1989, this Plan was approved by the Ministry of Health. As noted, the applicant alleges that the subsequent transfer of obstetrics and paediatrics at or around July 1, 1989 from St. Mary's to Kitchener-Waterloo constituted a sale within the meaning of section 63 of the Act. As can be seen however, the Plan reflected far more than the decision that obstetrics and paediatrics would no longer be performed at St. Mary's but only at Kitchener-Waterloo, as of July 1, 1989. Many of the services that were to be provided under the Plan by only one of the hospitals, were then being provided by both institutions, including obstetrics and paediatrics. The avoidance of such duplication, and the financial and practical inefficiencies that resulted, was one goal of the Plan.
- As of May 15, 1989 there were 143 nurses working in the obstetrics and paediatric departments of Kitchener-Waterloo. This figure includes full-time, part-time, and casual nurses. Of those nurses, 103 worked in obstetrics, and 40 in the paediatrics department. If the full-time, part-time, and casual nursing positions were converted into the equivalent of full-time positions, there would have been approximately 68 full-time nursing positions in the two units in question before rationalization was implemented. Jumping ahead, after the rationalization was fully implemented with respect to these two departments, there were 217 nurses or nursing positions in obstetrics and paediatrics, the equivalent of approximately 154 full-time positions. As a result of

the realignment, there were ultimately 74 newly-created positions in the obstetrics and paediatrics departments at Kitchener-Waterloo, combining full-time, part-time, and casual positions.

- 18. Shortly after the Plan was approved by the Ministry, the District Health Council set up a joint committee to work out the details with respect to the implementation of the Plan, and to monitor and supervise it.
- No decisions had been taken by the hospitals with respect to how to staff the newly-created positions at either hospital. Since services were moving in both directions as part of the realignment changes, staff might be moving from either hospital to the other. Although no final decision had been made, as of May 18, 1989, Kitchener-Waterloo believed that the nurses from St. Mary's obstetrics and paediatrics departments, both of which were to be closed, should be transferred over to Kitchener-Waterloo, with their seniority protected in some fashion. Kitchener-Waterloo's inclination was that nurses in the units affected in both hospitals should be considered in one personnel pool, each maintaining their respective individual seniority, and the Hospital filling the newly-created positions from within that pool. The Hospital was motivated by two concerns in favouring such a transfer arrangement. First, consistent with its practices and policies in previous experiences, it wanted to find jobs for the 51 surplus nurses who were to be laid off because of the bed closures in its gynaecological and medical-surgical units. Second, it wanted to fill the 74 newly created positions with the nurses most able to immediately step in and perform the work. On average, it was clear that the St. Mary's nurses, who were working there in the obstetrics and paediatrics units, would have more of the specific skills needed and would be better able to quickly work in similar units at Kitchener-Waterloo than the laid off Kitchener-Waterloo medical and surgical nurses. Not only would the St. Mary's nurses possess greater experience and skills in the relevant area, they would be able to begin work with less training and therefore less expense to Kitchener-Waterloo.
- 20. By May 23, 1989, Kitchener-Waterloo had decided to purchase as much of the equipment from the St. Mary's obstetrics and paediatrics services as was feasible.
- In all these circumstances, we conclude that the Hospital (until subsequently learning of O.N.A.'s position that it would pursue successor rights) favoured filling the newly-created positions with the most skilled nurses. It had met with the medical and surgical nurses who were to be laid off, but had not promised them preferential hiring over any St. Mary's nurses. It had a practice of filling positions with the most skilled nurses. The St. Mary's obstetrics and paediatrics nurses were generally the most skilled of the two competing groups. Such a preference was reasonable, given the shortness of the time-table in which to plan and implement the significant changes, the financial costs of any such change, the difficult budgetary position that Kitchener-Waterloo was in at the time, and the fact that they wanted to serve the patient community as effectively and as professionally as possible. In those circumstances, it would hardly be surprising that Kitchener-Waterloo favoured an arrangement whereby it could arrange for the more skilled St. Mary's obstetrics and paediatric nurses to work in the expanded services at Kitchener-Waterloo.
- On May 23, 1989, Kitchener-Waterloo learned from some of its own nurses and from Marie Askin, the Vice President-Nursing at St. Mary's, that O.N.A. was intent upon pursuing successor rights under the *Labour Relations Act* with respect to the transaction. Ms. Skelton-Green became quite concerned. The obstetrics and paediatrics departments were, as of that date, scheduled to be moved over by July 1, 1989, and she felt that there was no room in the time-table to negotiate an agreement with O.N.A. As well, she testified that she had no real understanding of what "successor rights" meant under the *Labour Relations Act*. The next day, May 24, 1989, she phoned the legal department of the Ontario Hospital Association ("O.H.A."), to ask them about

the meaning of O.N.A.'s claim that it would pursue successor rights, and what successor rights might mean, if O.N.A. were successful. Although the O.H.A. had published a guide covering related circumstances, Ms. Skelton-Green was told that the guide would not be particularly helpful. She was told, however, that successor rights would mean that the collective agreement would come along with any nurses from St. Mary's who came over to Kitchener-Waterloo. She could not recall whom she had spoken to at the Ontario Hospital Association. As a result of this conversation, and given her limited understanding of "successor rights", Ms. Skelton-Green assumed that if any St. Mary's nurses were hired to work in the Kitchener-Waterloo obstetrics and paediatrics departments, they would continue to be represented by O.N.A. and the terms of its collective agreement would apply to them, while any Kitchener-Waterloo nurses working in the same department, and performing indistinguishable work, would not be represented by O.N.A. nor have the collective agreement apply to them.

- 23. On May 25, 1989, a meeting was held at Kitchener-Waterloo of the Special Nursing Administration Group, to discuss, amongst other things, the rationalization. Ms. Skelton-Green advised the group that in 1986 the Ontario Hospital Association had drafted a model transfer agreement, however, it had never been tested in a situation where unionized employees were transferring to a non-unionized hospital, which was the situation at hand. The Minutes of this meeting reflect what occurred and read, in part, as follows: "initially it appeared that we should get busy and negotiate an employee transfer agreement between the two hospitals. There is, however, a catch because St. Mary's General Hospital's R.N.'s are represented by O.N.A., there would be a third party to the agreement the union may seek 'successor rights', so that the staff that comes from St. Mary's General Hospital to Kitchener-Waterloo will continue to be O.N.A. members. A further complication is that we still have obligations to our own staff displaced by the June 1 bed closures..."
- The meeting group considered three possible options for treatment of the staff. First, have no transfer agreement at all, but give first priority to the new jobs to the Kitchener-Waterloo staff, and then consider the St. Mary's staff along with others as new hires: second, have an arrangement where the openings would be advertised at St. Mary's and St. Mary's would receive some preferred status along with Kitchener-Waterloo nurses; third, simply proceed with the transfer agreement and deal with possible consequences if and when they arise. Kitchener-Waterloo realized that the second and third options, whereby some preference be given to St. Mary's nurses, were best from the perspective of filling the new jobs with those with the best nursing skills for the positions. At the hearings, Ms. Skelton-Green testified that the Hospital's policy, when filling positions with internal candidates, was that experience and skill were the priorities, and seniority was determinative only if all other factors were equal.
- Nevertheless, some time between the meeting of May 25, 1989, and the end of that month, Kitchener-Waterloo made the decision that no transfers would take place. That decision was made by Al Collins, the President of Kitchener-Waterloo Hospital, solely on the recommendation of Ms. Skelton-Green, and it was based upon the reasons she provided to Collins. Collins did not testify. Ms. Skelton-Green recommended to Collins that the displaced Kitchener-Waterloo staff be given preferential treatment, and that postings would first be done on an internal basis. After all the displaced Kitchener-Waterloo nurses had had an opportunity to bid for and fill the newly-created positions, and any resulting vacant positions because of a successful bid, then the remaining vacancies would be opened up to both St. Mary's nurses and others in the community on an equal new hire basis; that is, she recommended that any St. Mary's nurse in the obstetrics or paediatrics departments was to be treated exactly the same as a nurse with no connection to either hospital, applying as a new hire.

- 26. Ms. Skelton-Green testified that she recommended this approach for several reasons. Ultimately, she had decided that the laid off Kitchener-Waterloo nurses should have first priority, irrespective of other factors. First, as a matter of conscience, she felt that Kitchener-Waterloo ought to protect its own staff. Second, it had become clear, contrary to her prior belief, that a movement of staff in both directions would not occur initially. During the ongoing discussions, the two hospitals had agreed to a time-table for the transfer of the various services. Although Kitchener-Waterloo had sought to delay the transfer of certain services beyond the following dates, it was ultimately agreed that obstetrics would close at St. Mary's as of July 1, paediatrics as of August 1, and gynaecology as of September 1. Though different services would be moving to St. Mary's from Kitchener-Waterloo, St. Mary's first had to substantially renovate its physical facilities. It became apparent that although Kitchener-Waterloo would need additional nurses relatively quickly as a result of the realignment, St. Mary's would not be in a position to require or accept further nurses for quite some time. There would not therefore be any concurrent exchange of nurses, as earlier believed. Third, posting the newly-created positions internally first was consistent with past practice and policies of the Hospital. Fourth, at the April 21, 1989 meeting with the nurses from the medical and surgical units who were to be laid off, the Hospital had advised them that they would have an opportunity to apply for the newly-created positions. Although she testified that these four were the only reasons for her decision not to have a transfer arrangement of some sort, Ms. Skelton-Green acknowledged that, from Kitchener-Waterloo's perspective, to transfer any of the St. Mary's nurses over, given the timing, would have made things extremely difficult, for the Hospital would have to negotiate with O.N.A. over how to treat those nurses. It was neither feasible nor practical to engage in such negotiations given the transfer date. She had concluded that any St. Mary's nurses who came over to Kitchener-Waterloo on a transfer basis (that is, with some seniority recognized) would continue to be represented by O.N.A. and covered by a collective agreement, leading to significant administrative difficulties, as the Hospital would then have nurses working side by side, some of whom were covered by a collective agreement and some of whom were not.
- On June 1, 1989, the Hospital closed the 43 beds in its gynaecological and medical-surgical units. Some time shortly after June 1, 1989, Collins decided that none of the equipment from the obstetrics and paediatrics departments of St. Mary's would be purchased by the Hospital, contrary to the earlier decision to purchase as much as possible. Ms. Skelton-Green testified that the biomedical technicians at Kitchener-Waterloo had advised Collins that it did not make sense to buy any of the equipment, since it was old and unsuited in the long run to Kitchener-Waterloo's needs.
- 28. On June 2, 1989, O.N.A. wrote to President Collins, asking that the parties meet in order to discuss the transfer. On June 9, 1989, Collins responded, indicating that there was no need for the parties to meet, as there were no transfers of personnel from St. Mary's to Kitchener-Waterloo, and each hospital was to look after its own nurses.
- During this period and throughout the following months, the hospitals continued to coordinate their efforts and to deal jointly with a wide variety of questions arising from the rationalization. Through joint committee participation and decision making, the parties continued to deal
 with the timing of the move, equipment issues, the details of the movement of patients, and indeed
 with respect to all matters except, apparently, the treatment of staffing questions. On that issue,
 except with respect to the timing of when any of the St. Mary's nurses who had been hired by
 Kitchener-Waterloo might be released from their St. Mary's obligations and move over to Kitchener-Waterloo, the two hospitals agreed to deal independently with their own staffing concerns.
 On June 19, 1989, the newly-created positions in obstetrics and paediatrics were posted internally
 at Kitchener-Waterloo. When all the positions were internally filled, the result was that no Kitch-

ener-Waterloo nurse, who would have been laid off because of the bed closures in gynaecology and medical-surgical, in fact was laid off.

- 30. In early July, 1989, the staff in the obstetrics department at Kitchener-Waterloo were expressing their concern to management because of the quality of the nursing care in the obstetrics department. More specifically, the staff were requesting that more nurses who had worked in the St. Mary's obstetrics department be hired, as they were more qualified to work and could immediately step in and provide the needed level of service. Staff requested that any restrictions on transfers from St. Mary's be reduced, for quality of care reasons. The Hospital maintained its position that all nurses from outside Kitchener-Waterloo be treated as new hires.
- After the internal postings and rebound openings were filled by Kitchener-Waterloo nurses, there remained 33 positions open in the obstetrics and paediatrics services. Those positions were then advertised to the general community. St. Mary's nurses were free to apply, but along with other nurses in the general community, as new hires. Ms. Skelton-Green testified that there were only two reasons why it was decided, after giving preference to the Kitchener-Waterloo nurses, to treat the St. Mary's nurses as new hires. First, she took this position because she felt that other nurses in the community (that is, those unconnected to either hospital) would object to preferential treatment afforded to the St. Mary's nurses. Second, she remained concerned, because of budgetary problems at Kitchener-Waterloo, that there might be layoffs in the future and she wanted to continue to protect the Kitchener-Waterloo nurses. If St. Mary's nurses were to work at Kitchener-Waterloo, with their seniority protected, this might result in her view in the future layoffs of Kitchener-Waterloo nurses. Ms. Skelton-Green testified that a concern over potential successor rights, or an application asserting such rights by O.N.A., formed no part of the reason for this decision. When the remaining 33 positions were advertised, 42 nurses from the St. Mary's obstetrics and paediatric services applied and were interviewed. All 42 were offered positions before any unconnected nurse and 27 of the 42 nurses accepted the offers. Most of those 27 were hired into areas where they had been working previously. These 27 did not require specific training, but only a general orientation to Kitchener-Waterloo hospital. It is clear that the time and expense of training or orienting the 27 St. Mary's nurses was significantly less than was required to train the Kitchener-Waterloo nurses who posted into the newly-created positions. The parties agreed that some of the 42 nurses who had applied for jobs, but did not accept the offers, did not do so because it would have resulted in lower wages or reduced or different hours, given that they were being hired as new hires. The 27 nurses from St. Mary's who did accept did not all come over to Kitchener-Waterloo until early September, 1989.
 - 32. As of the beginning of September, 1989, when the hirings were complete, Kitchener-Waterloo employed approximately 807 nurses, both full-time and part-time. Of those, 156 were in the obstetrics department and 57 were in the paediatrics department, for a total of 213 in the two departments in question. Four vacancies remained in the two departments, bringing the total nurses at complement, to 217. Of the 213 then in the departments, 19 had been hired into the obstetrics department from St. Mary's nurses, and 8 had been hired into the paediatrics department from St. Mary's, yielding the 27 nurses who in the result had been hired from the St. Mary's obstetrics and paediatrics departments.

THE DECISION

33. The applicant asserts that a sale within the meaning of section 63 has occurred, through the transfer of the obstetrics and paediatrics departments from St. Mary's to Kitchener-Waterloo. If the Board should determine that a sale has occurred, it is common ground that intermingling within the meaning of section 63(6) has occurred. The applicant further asserts that Kitchener-

Waterloo breached sections 50, 64, 66, and 67 of the Act in its treatment of the St. Mary's nurses, and in its refusal to offer any of them employment on a transfer basis. In its final submissions, the applicant indicated that it was no longer relying upon alleged breaches of sections 70 and 72 of the Act.

- 34. The relevant sections of the Act are as follows:
 - 63. (1) In this section,
 - (a) "business" includes a part or parts thereof;
 - (b) "sells" includes leases, transfers and any other manner of disposition and "sold" and "sale" have corresponding meanings.
 - (2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.
 - (3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.
 - (4) Where a business was sold to a person and a trade union or council of trade unions was the bargaining agent of any of the employees in such business or a trade union or council of trade unions is the bargaining agent of the employees in any business carried on by the person to whom the business was sold, and,
 - (a) any question arises as to what constitutes the like bargaining unit referred to in subsection (3); or
 - (b) any person, trade union or council of trade unions claims that, by virtue of the operation of subsection (2) or (3), a conflict exists between the bargaining rights of the trade union or council of trade unions that represented the employees of the predecessor employer and the trade union or council of trade unions that represent the employees of the person to whom the business was sold,

the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (c) define the composition of the like bargaining unit referred to in subsection (3) with such modification, if any, as the Board considers necessary; and
- (d) amend, to such extent as the Board considers necessary, any bargaining unit in any certificate issued to any trade union or any bargaining unit defined in any collective agreement.
- (5) The Board may, upon the application of any person, trade union or council of trade unions concerned, made within sixty days after the successor employer referred to in subsection (2) becomes bound by the collective agreement, or within sixty days after the trade union or council

of trade unions has given a notice under subsection (3), terminate the bargaining rights of the trade union or council of trade unions bound by the collective agreement or that has given notice, as the case may be, if, in the opinion of the Board, the person to whom the business was sold has changed its character so that it is substantially different from the business of the predecessor employer.

- (6) Notwithstanding subsections (2) and (3), where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,
 - (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);
 - (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
 - (c) declare which trade union, trade unions or council of trade unions, if any shall be the bargaining agent or agents for the employees in such unit or units; and
 - (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.
- (7) Where a trade union or council of trade unions is declared to be the bargaining agent under subsection (6) and it is not already bound by a collective agreement with the successor employer with respect to the employees for whom it is declared to be the bargaining agent, it is entitled to give to the employer a written notice of its desire to bargain with a view to making a collective agreement, and such notice has the same effect as a notice under section 14.
- (8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes as it considers appropriate.
- (9) Where an application is made under this section, an employer is not required, notwithstanding that a notice has been given by a trade union or council of trade unions, to bargain with that trade union or council of trade unions concerning the employees to whom the application relates until the Board has disposed of the application and has declared which trade union or council of trade unions, if any, has the right to bargain with the employer on behalf of the employees concerned in the application.
- (10) For the purposes of sections 5, 57, 59, 61 and 123, a notice given by a trade union or council of trade unions under subsection (3) or a declaration made by the Board under subsection (6) has the same effect as a certification under section 7.
- (11) Where one or more municipalities as defined in the *Municipal Affairs Act* is erected into another municipality, the two or more such municipalities are amalgamated, united or otherwise joined together, or all or part of one such municipality is annexed, attached or added to another such municipality, the employees of the municipalities concerned shall be deemed to have been intermingled, and
 - (a) the Board may exercise the like powers as it may exercise under subsections(6) and (8) with respect to the sale of a business under this section;
 - (b) the new or enlarged municipality has the like rights and obligations as a person to whom a business is sold under this section and who intermingles the employees of one of his businesses with those of another of his businesses; and

- (c) any trade union or council of trade unions concerned has the like rights and obligations as it would have in the case of the intermingling of employees in two or more businesses under this section.
- (12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision thereon is final and conclusive for the purposes of this Act.
- (13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.
- 50. A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.
- 64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.
- 66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,
 - (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
 - (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
 - (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.
- 67.-(1) No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargaining with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.
- (2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall, so long as another trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with an employer or an employers' organization on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.
- 35. Over the years, the Board has on numerous occasions remarked upon the purpose and effect of section 63 of the Act. In *Metropolitan Parking Inc.* [1979] OLRB Rep. Dec. 1193, the Board wrote, in part, as follows:
 - 18. ... When a business (or a part thereof) is transferred, or disposed of, the transferee acquires

the business subject to the collective bargaining obligations of the transferor, the union retains bargaining rights for the employees in a "like unit" to that which existed prior to the transfer, and the transferee must continue to apply the collective agreement (if any) to the unit until the Board otherwise declares. Since the bargaining structure inherited from the predecessor may be inappropriate, or create conflicts with the successor's pre-existing bargaining obligations, the Board is empowered to define and, if necessary, restructure the unit to suit the new circumstances. Likewise, if the successor employer significantly alters the character of the business, or intermingles the employees of the purchased business with those in its existing operation, the Board may redefine the bargaining structure or determine whether the union's bargaining rights should be continued (section 63(4)-(6)). However, until the Board otherwise declares, the transferee stands in the shoes of his predecessor with respect to established bargaining rights.

19. In the absence of a successor rights provision any change in the legal entity constituting the employer would destroy subsisting bargaining rights, whether they flow from certification or derive from a collective agreement with the predecessor employer. Incorporation of the business, its transfer to other individuals, or a change in a partnership, would all effect a change in "the employer" even where the plant equipment, products and work force remain substantially the same. The employees might find themselves working at the same plant, at the same machine, under the same working conditions, with the same supervision, doing exactly the same job as before, but as a result of a transfer (of which they may not even be aware) their collective bargaining rights and their collective agreement would disappear. Section [63] avoids this destruction of bargaining rights and prevents a dislocation of the collective bargaining status quo by transforming the institutional rights of the union and the individual rights of the employees, (both of which are grounded upon the statute) into a form of "vested interest" which becomes rooted in the business entity, and like a charge on property, "runs with the business." In Marvel Jewelry, [1975] OLRB Rep. Sept. 733 the Board described the effect of section [63] as follows:

"Section [63] recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become attached to a business. so long as the business continues to function, the obligations run with that business, regardless of any change of ownership."

20. The concept of successorship is an attempt to balance the interests and expectations of parties in the industrial community and preserve both collective bargaining stability and industrial peace. The employer retains his freedom to dispose of all or part of his business; but it is recognized that one cannot realistically expect that the interest of employees will be at the forefront of his negotiations. On the other hand, his employees may have recently struggled to become organized or to achieve a collective agreement. They expect that their statutory right to bargain collectively and their negotiated conditions of employment will have some permanence. Their expectations would be frustrated if a transfer of the business terminated both. Of course, the transfer of the business is not the only occurrence which could frustrate employee expectations. A re-organization of the production process, the introduction of "job destroying" technological change or a geographic move beyond the scope of the collective agreement will also materially change the industrial relations status quo. A business transfer, however, involves a new employer and raises legal problems of an entirely different order which cannot easily be accommodated in a bilateral bargaining process. It is to these problems that section [63] is addressed.

21. The "successor rights issue" is not a new one in Ontario. It was discussed by this Board in a number of early cases, (see, for example: New Method Laundry and Dry Cleaners, 57 CLLC ¶16,199; and Brantford Product Co. Ltd., 61 CLLC ¶16,193); and was considered by both the Legislature's Select Committee on Labour Relations (1957-1958) and by H. Carl Goldenberg, Q.C. in his Report of the Royal Commission on Labour Management Relations in the Construction Industry, (Queen's Printer, Toronto, 1962, at pp.44-47.) The Select committee's recommendation provides a useful description of the kind of situation to which section [63] gives rise:

"It is the recommendation of the Committee that where -

 A Trade Union has been certified as the bargaining unit [sic] for the employees of an employer, or

- Where an employer has entered into a collective agreement with a union, and where in either instance the facts establish that the plant, property, equipment, products and working force remain virtually unchanged as a result of the sale or other transfer-in-law of the business of the employer and no essential attribute of the employment relationship has been changed as a result of the sale or other transfer-in-law, the certification and consequent obligation should continue or the collective agreement should continue to be binding, as the case may be notwithstanding the change in legal ownership of the business enterprise."
- 22. The first successor rights provisions were enacted by *The Labour Relations Amendment Act*, 1961, S.O. 1961-62, c.68. These were in all material respects similar to the present section [63], but the legislation was never proclaimed. When it was re-introduced as *The Labour Relations Amendment Act*, 1962, S.O. 1962-63, c. 70, there was a significant change. The subsection ensuring a "flow through" of the collective agreement [now section 63(2)] was omitted. The implication is that the Legislature intended only to preserve bargaining rights; it was not concerned with preserving the attributes of the employment relationship embodied in the employees' collective agreement. The successor employer remained free to negotiate his own bargain.
- 23. In 1970 the Legislature significantly expanded the effect of the successor rights section by reintroducing the subsection preserving the collective agreement [now section 63(2).] This amendment abrogated the notion of privity of contract, and provided that the successor would be bound by the predecessor's collective agreement. It is now up to a prospective transferee to investigate the terms of the bargain which the predecessor has made, and to see that this is taken into account in the transaction by which it acquires the business. It might also be noted that the amendment was part of a remedial package which contained section 1(4) of the Act a section which, like section [63], prevents legal form or commercial law conceptions from dictating collective bargaining results. Section 1(4) provides:

"Where, in the opinion of the Board, associated or related activities or business are carried on, whether or not simultaneously, by or through more than one corporation, individual, form, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this act and grant relief, by way of declaration or otherwise, as it may deem appropriate."

Both section [63] and section 1(4) recognize that a "business" is not a precise legal concept, but rather an economic activity which can be conducted through a variety of legal vehicles or arrangements. It is this economic activity which gives rise to the employer-employee relationships regulated by the Act.

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27. The task of the Board in any particular case is to determine whether there has been a "transfer" or "disposition" of a "business" within the meaning of section [63] of the Act; and, if necessary, to sort out conflicting bargaining rights or problems of bargaining structure. Following the decision of the Court of Appeal in *R. ex rel Kitchener Food Market Ltd.*, et al., (1966), 54 D.L.R. (2d) 219, and the enactment of what is now section [63], the Board's decisions in this regard have become "final and conclusive for the purposes of the Act." It is the Board, therefore, which must give a meaning to the statute which will effect the legislative intention. The Board has always construed the terms "sale" and "business" broadly, in view of the collective bargaining purpose which the concept of successorship was designed to achieve. As the Board noted in *Thorco Manufacturing Ltd.*, 65 CLLC ¶16,052:

"It is a rudimentary principle applicable to the construction of remedial legislation that, consistent with the language of the enactment, the interpretation which must be adopted is the one which best serves to advance the remedy and to suppress the mischief contemplated by the legislation. (See also section 10 of *The Interpretation Act*, R.S.O. 1960, c. 191). Having regard to this principle and to the fact that the language of the section is entirely susceptible of and in agreement with such a meaning, we are

impelled to give the section a large and liberal rather than a narrow or restrictive construction."

Little reliance is placed upon the legal form which a business disposition happens to take as between the old employer and its successor. The important factor, as far as collective bargaining law is concerned, is the relationship between the successor, the employees and the undertaking. Common law or commercial law analogies are of limited usefulness. It was the extension of these principles into the realm of collective bargaining law which gave rise to the successor rights problem in the first place and made remedial legislation necessary. Likewise, the meaning given to the terms "business" or "disposition" in other statutes is of limited assistance in determining their meaning in *The Labour Relations Act*.

28. A section [63] application really involves two related questions: has there been a "sale" within the extended statutory definition of that term; and does what has been "sold", "transferred" or "disposed of" constitute a "business" or "part of a business". There is seldom any problem with respect to the first question. The Board has consistently followed the approach taken in *Thorco*, *supra*:

"According to its strict signification, the term sells is usually akin to describe a transaction involving the disposal of property by one to another in consideration of a sum paid or agreed to be paid by the recipient in money or its equivalent. As used in section [63] however, the word sells has been given a wide definition which includes lease, transfers and any other manner of disposition of the business or part thereof. In legal parlance the word lease generally denotes a specific kind of contract by which one party, called the lessor, for a consideration in money or its equivalent, confers on another, called the lessee, the exclusive possession of certain property for a period of time.

The word transfers, however, is obviously a term of wide significance and unless restricted by the context is capable of describing a multitude of transactions whether by sale, exchange gift, trust or otherwise by which property, rights, or interest, etc. are transmitted absolutely, conditionally etc. or by operation of law from one person to another. We are unable to find anything in the language of the section to denote any legislative intention to restrict the meaning of the word transfers to any particular kind of transfer. Also, having regard to the particular language used and the remedial object sought to be attained by and the wide meaning which must be attributed to the preceding word transfers, it is our opinion that the generality of the words 'any other manner of disposition' is not intended to be in any way limited or interpreted ejusdem generis with the words leases or transfers. In our opinion, it is more in harmony with the language of and the remedy envisaged by the enactment to interpret the words 'and any other manner of disposition' as an omnibus or saving provision intended to include dispositions of the business or a part or parts thereof by any mode or means whatever which are not appropriately described by the preceding words which state that sells includes leases or transfers.'

The Board has found a transfer of a business, through a "chain" transaction, or sequence of sales (*Culverhouse Foods Ltd.*, [1976] OLRB Rep. Nov. 691; *Trenton Riverside Dairies*, [1964] OLRB Rep. May 72), a corporate reorganization and merger, (*Eaton Yale Ltd.*, [1971] OLRB Rep. Oct. 667; *Westeel-Rosco Ltd.*, [1966] OLRB Rep. Dec. 718) and through the offices of a receiver where "the business" has been transferred as a going concern (*Marvel Jewellery Ltd.*, [1975] OLRB Rep. Sept. 733; *Field-Price Ltd.*, [1973] OLRB Rep. Oct. 543; *Parnel Foods Ltd.*, [1971] OLRB Rep. Nov. 715.) The manner of disposition is irrelevant so long as a transfer has, in fact, taken place. The interposition of a third party, acting as an agent or conduit, does not affect the result.

29. A more difficult question is whether it is the predecessor's "business" which has been transferred and continued by the successor or, alternatively, there has merely been a transfer of assets or other incidental elements of the business. Unlike *The Successor Rights (Crown Transfers) Act, The Labour Relations Act* does not contain a statutory definition of "business", and it is the Board, therefore, which must develop an appropriate meaning. In *Raymond Cote*, [1968] OLRB Rep. Mar. 1211 the Board commented:

"The meaning to be attached to the word 'business' depends to a great extent on the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise akin by itself necessarily comprises a business. It has been expressed that a business is 'the totality of the undertaking.' The physical assets of buildings, tools and equipment used in a business are not necessarily the undertaking *per se* but are, along with management and operating personnel and their skills, necessary in the operations to fulfill the obligations undertaken with a hope of producing profit to assume its success. The total of these things along with certain intangibles such as goodwill constitute a business."

While one usually thinks of a business as a profit-making economic activity, the term "business" in *The Labour Relations Act* cannot be so restricted. The Act also applies to municipalities, public libraries, universities, school boards, hospitals and other non-profit service undertakings which have employees and engage in collective bargaining. The economic activities of these entities are of an entirely different character from those of commercial enterprises, yet the definition of "business" must be broad enough to include them. Even a wholly commercial enterprise will consist of many elements, some of which will be integral, and others merely incidental, to the total undertaking. And, in the case of undertakings in the service sector, "know how", managerial systems and other intangibles are likely to be more important factors in the overall organization than particular physical plant and equipment.

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32. Of particular significance for a labour relations statute is the continuity of the work performed before and after the transfer, since the trade union is certified to represent certain work groups, the collective agreement regulates the conditions of work for employees in those groups, and the purpose of section [63] is to preserve both the bargaining relationship and the collective agreement. If the work performed subsequent to the transaction is substantially similar to the work performed prior to the transaction, there is normally a strong inference that there has been a transfer of the business within the meaning of section [63]. This approach has not only been taken by the Board in a number of cases (see, for example, *Culverhouse, supra* and *Dennis Moran* [1977] OLRB Rep. Apr. 277) but also appears to have been adopted by the British Columbia Supreme Court in *R. v. B.C. Labour Relations Board ex parte Lodum Holdings Ltd.*, (1969), 3 D.L.R. (3d) 41. In that case, the Court was considering an application for *certiorari* in respect of a decision involving what was then the successor rights section of the *British Columbia Labour Relations Act* (it has since been amended.) At page 52 Dryer, J. characterized the question before the Board as follows:

"One must keep in mind that the problem before the Labour relations Board was one of labour relations and consequently, though as pointed out above the whole law must be considered, the weight to be assigned various factors and the inferences to be drawn from certain evidentiary facts are not necessarily the same as would be the case if the problem were one of, say, taxation or control of assets. The importance of the 'business' in its labour relations aspect is the jobs it provides for the employees. One factor to be considered therefore, is whether the same or substantially the same jobs are being performed. That depends on a number of factors such as whether the jobs are being performed at the same or substantially the same times and places, in respect of the same or substantially the same goods or services, and for the same or substantially the same customers or patrons, etc. These matters are, in my opinion, more important than the form of transfer."

Unless there is a continuation of the work and jobs, it would make little sense to preserve the collective agreement. Accordingly, the continuity of the work done is an important indicium of a transfer of a business.

33. There need not be a transfer of the entire business before section [63] comes not play. The successor rights provisions may also be triggered by the transfer of "part of a business." [See section [63](1).] This language suggests that bargaining rights continue when something considerably less than "the totality of the undertaking" has been transferred. Presumably the Legislature envisaged the preservation of bargaining rights where there is a severance and transfer of a discrete, cohesive portion of the economic organization or activities which comprise the totality

of "the business". The Board has found a transfer of "part of a business", where one of a chain of retail stores has been sold to a competitor (Supercity Discount Foods, [1979] OLRB Rep. Apr. 119; Loblaws Groceterias Ltd., [1973] OLRB Rep. Jan. 73); where there is a transfer of the right and means to produce one of the products formerly produced by the predecessor's business; (Canac Shock Absorbers, [1973] OLRB Rep. Oct. 508); where there was a transfer of certain milk delivery routes in a particular geographic area (Borden Co. Ltd., [1970] OLRB Rep. Jan. 1244), and where there was a transfer of the oil burner installation and service branch of a firm which was primarily engaged in the sale and delivery of fuel oil (Automatic Fuels Ltd., [1971] OLRB Rep. May 515.) In each of these cases the Board found that the predecessor had transferred a coherent and severable part of its economic organization - managerial or employee skills, plant, equipment, "know how" and goodwill - thereby allowing the successor to serve the market formerly served by the predecessor. This economic organization undertook activities which gave rise to employment, and the terms of employment, together with the union's right to bargain about them, were preserved. The part of the predecessor's business which it no longer wished to continue provided the business opportunity which the successor was able to pursue to its own advantage. It was otherwise in Woodway Structural Components, [1971] OLRB Rep. Nov. 732, Canada Cement LaFarge Ltd., [1975] OLRB Rep. Dec. 905, and Dufferin Steel, [1976] OLRB Rep. Mar. 81. In these cases there was a significant change in the character of the work, product or market so that the Board concluded that what had been transferred was not the predecessor's business. The successor had merely incorporated incidental elements of that business into his own economic organization - even though each of the elements acquired could previously be found in the predecessor's business organization and, in that sense, were "part" of the predecessor's business. What was transferred lacked that dynamic quality which distinguishes an idle collection of surplus assets from an active, severable and coherent part of a going concern.

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36. Despite the labour relations focus of the statute "the business" is not synonymous with its employees or their work. In exceptional circumstances the accumulated skills, ability, know how or business contacts of the employee may be so crucial, or irreplaceable, that their loss would mean the demise of all or part of the business as a going concern; but these cases are rare. For the most part, the continued employment of the predecessor's employees is only one factor to be considered. The reason for this is succinctly stated by the Canada Labour Relations Board in *NABETv. Radio CJYC Ltd. et al.* (1978) 1 Can LRBR 565.

"The purpose of the successorship provisions is to preserve bargaining rights in spite of changes in the ownership or control of an enterprise. Bargaining rights are typically granted to a trade union as bargaining gent for a unit of employees of an employer employed in certain classifications or at a certain location, or for all employees with specified exceptions. Bargaining rights do not attach to certain specific employees as individuals. Therefore, in defining the concept of business for the purpose of successorship, it would be incorrect to focus upon whether certain identifiable persons formerly in the employ of A are now in the employ of B. Furthermore, to focus on that question would invite employers to avoid the successorship provisions by refusing to maintain continuity of the individuals employed. A key to the protecting of bargaining rights must be whether there is continuity in the nature of the work done (i.e. in classifications or job content for which the union was certified) not in the actual persons who perform it...

But continuity of the work done is not sufficient alone to satisfy section 144. There must be some nexus between two employers other than the fact that one employed persons to do certain work that the other now does or will do, before one can be declared the successor of the other. Otherwise a loss of work to a competitor employer would result in a successorship. There must be some continuity in the employing enterprise for which a union holds bargaining rights as well as continuity in the nature of the work. The two go hand in hand.

A continuity of the work and/or the employees is significant, but it is not always sufficient, to sustain a finding of successorship. This Board adopted a similar view in *British American Bank*

Note Co. Ltd., [1979] OLRB Rep. Feb. 72 - a case which, like the present one, involved the consequences of a loss of a contract:

"There are limits, however, to the extent to which section [63] can be used to preserve collective bargaining rights. It is clear that the provisions of this section do not attach bargaining rights to the work being performed by a business but only to the business itself. While this distinction may not be easy to draw in some cases, it is essential that it be maintained since section [63] cannot be interpreted as guaranteeing to a bargaining agent an absolute right of property in the work performed by its members. Section [63] serves only to preserve bargaining rights that have become attached to a business entity so that when that business entity is transferred, either in whole or in part, those bargaining rights survive and bind the successor employer."

The focus of section [63] is the business entity - the employer's total economic organization - not simply the work which the employees perform.

- 36. With these general observations in mind, we turn to consider some of the Board's juris-prudence in the health care sector. In *Thunder Bay Ambulance Services Inc.* [1978] OLRB Rep. May 467, the application involved an alleged "sale" of an ambulance service in a municipality. Prior to the sale, two separate ambulance services had operated in the municipality in question, each one operated by a different hospital in the area. The applicant union had collective agreements with respect to employees involved in both ambulance services. The hospitals decided to discontinue their respective ambulance services, for economic reasons, and a public request was made for proposals to operate an ambulance service in the municipal area. The alleged successor was the successful applicant for the ambulance service. Licences to operate ambulance services were then issued by a branch of the Ministry of Health. The two hospitals had each been required to hold a licence for the period during which they carried on their ambulance services. The successful bidder, Thunder Bay Ambulance Services Inc., was granted a new licence by the Ministry of Health to operate its service. The Board concluded that a "sale" within the meaning of section 63 of the Act had occurred. In so ruling, the Board commented as follows:
 - 14. This case requires a careful analysis because of the complicating factor of third party involvement. The Ministry of Health, although neither the predecessor nor successor employer, owned the assets which were necessary to the ambulance service provided by both the alleged predecessor and successor and licensed and regulated the alleged predecessor as it does the successor. The Ministry is also the source of the cash flow as it provided and continues to provide funds on a monthly basis in an amount agreed between the operator of the ambulance service and itself. These funds are the only source of revenue for the operator of the ambulance service. The integral involvement of the Ministry must be taken into account in considering the nature of the alleged predecessor's business and more importantly, in determining whether or not there has been the transfer of that "business" or the establishment of a parallel or similar business.
 - 15. That part of the predecessor's business which is at issue can best be described as the management and operation of a group of assets owned by the Ministry of Health, for the purpose of providing ambulance service in the Municipality of Thunder Bay. The alleged successor manages and operates these same assets for the same purpose and therefore its business can be described in identical terms. This similarity of description, however, does not necessarily establish a "continuum" of the predecessor's business. In the absence of any direct contact between predecessor and successor, in the absence of the successor purchasing anything from the predecessor, and in the absence of the predecessor receiving any consideration from the alleged successor, it might be said that the predecessor employer did not sell or transfer its business but rather that it went out of business and a different, albeit parallel business, took its place. In the context of a regulated monopoly, the lack of hiatus and the similarity of function cannot be the overriding considerations. The issue must be determined on the basis of what, if anything, was transferred to the alleged successor.
 - 16. In a strict commercial or corporate sense, it is clear that there has been no transfer between the predecessor hospitals and the respondent as would constitute a sale. Indeed, the predeces-

sors had no assets, inventories (other than sheets, towels and other toiletries), accounts receivable or customer lists which could have been transferred and they were prohibited by law from transferring their licences to operate. The predecessors depended upon the maintenance of their relationship with the Ministry and not on customer goodwill. As discussed in para. 13 herein however, the Board must look beyond the form of the transaction in determining if there has been a "sale of a business" within the meaning of Section [63] of the Act. Notwithstanding the absence of contact between the hospitals and the Thunder Bay Ambulance Service, and notwithstanding the lack of consideration given and received between the two, the Board is satisfied that the essential elements of the predecessors' businesses were transferred to Thunder Bay Ambulance Services Inc. so as to constitute the sale of a business within the meaning of Section [63] of the Act.

- 17. In the view of the Board, the two essential elements of the predecessors' businesses were transferred to the alleged successor. Firstly, the exclusive use of the assets owned by the Ministry of Health was transferred. Although the same licence or piece of paper was not transferred between the two, the Board has no hesitation in finding that the exclusive entitlement, as embodied in a Ministry of Health Licence, was transferred. Secondly, the predecessors' management and organization in the person of Mr. Rudyke, and the predecessors' employees were also transferred. The predecessors' ambulance operations were largely managerial and organizational in nature and it follows that the transfer of managerial skills, albeit through a request for proposal system and competition, and the continuation of identical job functions filled by the same persons as were employed by the predecessors must weigh heavily with the Board.
- 37. In *Parkwood Hospital* [1980] OLRB Rep. May 759, the Board had to consider whether there had been a sale of part of a business from one hospital to another. In concluding that a sale had occurred, the Board wrote as follows:
 - 11. The respondent Ontario Nurses Association was the bargaining agent for full-time and part-time nurses employed by Victoria, *inter alia* in the transferred facilities. There were two separate bargaining units one for full-time employees, and one for part-time employees. There is a subsisting collective agreement with respect to the full-time unit. The agreement respecting the part-time unit was being renegotiated at the time of the transfer. On the basis of the evidence before us we have no hesitation in concluding that there has been a "sale" of "part of Victoria's business" from Victoria to Parkwood. The term "business" in section [63], is used in a general sense, and extends to the activities of hospitals, universities, Boards of Education, municipal corporations and other service undertakings which are subject to *The Labour Relations Act*. There is really no doubt that within this context, "part of the business of Victoria", (i.e. the care of certain patients and the means to provide that care), has been transferred to Parkwood. There remains the question of the desirability of continuing the union's bargaining rights within the bargaining structure established by the predecessor. ...
 - 12. The approach which the Board takes in circumstances such as those presently before us, is as set out in *City of Peterborough*, [1979] OLRB Rep. Feb. 133 at p. 134;

"The consistent point of departure in the decisions of the Board in applications under section [63] of the Act is a recognition that the primary purpose of the section is the preservation of employees' bargaining rights upon the transfer of a business. The section protects employees of a transferred undertaking against automatically losing their union or seeing their bargaining rights transferred to a bargaining agent not of their choosing. Thus while the remedial scope of the section allows the Board to engage in an assessment of what is the appropriate bargaining unit the criteria to be applied are not identical to those which obtain in an application for certification of previously unrepresented employees. While the Board may have regard to all of the criteria that apply to that determination in certification proceedings it must also, having regard to the purpose of section [63], seek to balance the interests of the employees of the transferred undertaking and their union with the interest of both the employer purchasing the undertaking as well as the interests of that employer's existing employees and their union. In the fashioning or amending of bargaining units under section [63] of the Act the Board must give effect to existing bargaining rights to the extent that those rights can be reasonably accommodated within the new employer's administrative structures. (Oshawa Wholesale Ltd. [1965] OLRB Rep. Feb. 504; The Corp. of the City of Kitchener [1973] OLRB Rep. June 306; Yarntex Perth, Division of Yarntex Corporation Ltd. [1975] OLRB Rep. Feb. 137). A particular concern in the determination of bargaining units under section [63] of The Labour Relations Act is that existing bargaining structures not lightly be interfered with. The Board recognizes the value of a bargaining unit that has developed through a succession of collective agreements. A bargaining structure with some substantial history to it often indicates a sound bargaining relationship. More often than not it has evolved through increased communication and has come to reflect a workable pattern of mutual expectations between union and employer. Since the promotion of sound collective bargaining relationships is what the Labour Relations Act is all about, the Board is understandably reluctant to dismantle a bargaining structure that has withstood the test of time."

Similar views are expressed in *Loblaws Groceterias Co. Ltd.* [1973] OLRB ep. Jan. 73 where the Board preserved a union's bargaining rights in a single retail store and declined to redefine the bargaining unit to include all stores in the municipal areas as it would have done had the union applied for certification for that one store. The Board emphasized that the purpose of section [63] is to *preserve* bargaining rights, and that in order to do so it may be necessary to continue a bargaining structure which might not have been considered "appropriate" if the union had applied for it on an application for certification. In the present case of course, a full-time, and part-time unit at the Westminster site would probably have been considered appropriate even on an application for certification. The general practice of the Board has been to allow employees at each existing location, to select a bargaining agent of their own choice (see, for example: *Extendicare* Board File 1585-77-R; decision released February 10, 1978 - unreported).

38. And in *Caressant Care Nursing Home of Canada Ltd.* [1984] OLRB Rep. Aug. 1060, the Board commented as follows:

15. In dealing with the main issues before the Board, in terms of a "sale of a business", and its consequences, two factors stand out in significance for the Board. The first is the fact that Caressant Care engaged in a transaction whereby it purchased the government-restricted right of Romi Nursing Home Ltd. to operate the 75 nursing-care beds formerly at Willson. That is of particular significance in light of the Board's decision in *Riverview Manor* [1983] OLRB Rep. Sept. 1564. But a second key circumstance not to be lost sight of, at least in assessing the consequences of any "sale", is the fact that the beds formerly operated under the collective agreement at Willson came to occupy only a portion of the new Nursing and Rest Home opened in St. Thomas by Caressant Care, and that Caressant Care's presence in the Nursing Home business in the City of St. Thomas itself was firmly established prior to its entering into negotiations for the right to operate the additional beds which came available through the tender invitation of Price Waterhouse.

16. In the Riverview Manor case, *supra*, the operator of Balmoral Nursing Home in Peterborough also was in financial trouble and having difficulty meeting the standards of the Ministry, and ultimately "sold" its licence and some vacant land it held in Peterborough to Daynes Health Care Ltd. an established Nursing Home operator located elsewhere in the Province. Daynes then built a new facility on the land it acquired, and used it to operate the beds formerly under licence to Balmoral. The Board, relying principally on the "transfer" of the licence, found that a "sale" of Balmoral's "business" had taken place.

. . .

19. While it is true that the same kind of detailed evidence of the Ministry was not placed before the Board in *Riverview*, there is nothing in that decision which now suggests that the Board in any way misconceived the nature of the transaction before it. The Board, in finding a "sale of a business" in that decision appears to have focused on the importance of the licence, owing to the limited availability of such licences in a given geographic area, and the evidence before the Board in this case only tends to confirm that thinking. In terms of both this and counsel's second point, concerning the weight the Board should be giving to the "entrepreneurial" interest in this case, it might be noted that much of the analysis in *Riverview*, in applying a "balancing of interests" test, is not entirely consistent with the way "sale of business" cases have been analyzed in

the past. Rather, the Board has generally focused on such questions as whether enough of the essential components of the business of the vendor can be traced into the hands of the purchaser as to cause the Board to find that it is in fact the same business, as opposed to a parallel business of a similar nature established by the purchaser; or, in other words, whether the purchaser's business can be said to "take its life" from that of the vendor. See, e.g. Thunder Bay Ambulance [1978] OLRB Rep. May, 467 at ¶13; Gordons Market, [1978] OLRB Rep. July 630, at ¶17; and more generally, Metropolitan Parking Inc., [1979] OLRB Rep. Dec. 1193; Tatham Company Limited, [1980] OLRB Rep. March 366. The Board in the concluding paragraphs of the Riverview case, in fact, returns to the more typical kind of analysis seen in these cases, and it is really on that basis that the Riverview case appears to be decided. At paragraph 38, the Board winds up as follows:

Applying section 63 to the unregulated private sector, the Board has consistently ruled that a successor who acquires all or most of a predecessor's assets and its customers, also inherits a trade union and any collective agreement. The same criteria ought to be applied to the case at hand, and lead us to the conclusion that a business has been sold. As to customers, the vast majority of the former residents of Balmoral Lodge are now residing at Riverview Manor. That is not surprising. An employer who gives up a licence or government contract, voluntarily or otherwise, can no longer service its former clientele. Along with the licence or contract, the successor often receives a captive market that is free of competition, not only from the predecessor, but also from others who lack the necessary authorization to carry on business. Riverview obtained two major assets from Balmoral, the licence and the land. The transfer of the licence is particularly significant, because it led most Balmoral residents to move to Riverview Manor. (Both parties to the transaction contemplated residents would move from one home to the other, as evidenced by the contract that ties the date from which interest funds to the transfer of patients.) In this sense, the licence is of the essence of the business.

20. There was not, in the present case, the transfer of any land by the insolvent company Caressant Care, but as the underlined portion of *Riverview* makes clear, it is the *licence* that is the essence of the Nursing Home business. It is interesting to note, in that regard, that Caressant Care initially tendered 1.17 million dollars for *all* of the assets of Romi (building and land included), and then offered \$907,000 for the licence alone. The Board is satisfied, therefore, that the transaction between Romi (through Price-Waterhouse) and Caressant Care whereby Romi surrendered its licence and Caressant Care acquired an equivalent one, constituted a "sale of a business", within the meaning of section 63 of the *Labour Relations Act*.

Has part of the business of St. Mary's been transferred to Kitchener-Waterloo? For 39 many years, the two hospitals had co-ordinated their efforts, in attempts to come up with a method and a plan for rationalizing their services, thereby decreasing their respective costs and better serving the community. Together the hospitals planned and adopted the realignment scheme. The Plan called for certain services to be discontinued at each hospital, and in response, to be expanded at the other hospital. The result of the changes was that neither hospital would be adversely affected, financially or otherwise, and that the exchange of services would be comparable. These decisions were jointly made. The hospitals realized that the closing of the obstetrics and paediatrics services at St. Mary's would lead directly to a substantial increase in the use of these services at Kitchener-Waterloo. In turn, Kitchener-Waterloo was able to provide these additional services because the hospitals agreed that Kitchener-Waterloo would no longer have to provide other services it had been providing before the realignment. St. Mary's had agreed to expand these other services. The hospitals jointly, through the auspices of the District Health Council, sought and obtained the approval of the Ministry of Health, as required by law. This approval was akin to a licence to execute the realignment scheme. Without Ministry approval, the hospitals could not legally have made the changes envisaged in the Plan. Indeed, the failure to secure such approval had led in the past to plans languishing unexecuted. The Ministry in effect licenced the hospitals to engage in the planned changes, including the transfer of the obstetrics and paediatrics departments from St. Mary's to Kitchener-Waterloo. With this official approval in hand, the hospitals together, over many

months, decided upon the numerous details of the realignment and implemented the changes. They agreed for example, to the time-tables for transferring patients, for closing services, and, where applicable, for releasing staff from St. Mary's who had been hired to work in the obstetrics and paediatrics services at Kitchener-Waterloo.

- 40 When the entire transaction is considered, we are satisfied that what occurred was a "transfer" or "sale" within the meaning of section 63, of part of the business of St. Mary's to Kitchener-Waterloo. Several factors are significant. The Ministry was concerned, as were the hospitals themselves, that the services provided to the community at large not change in any respect, in terms of total beds or provision of particular services. Similarly, the Ministry was concerned that the total financial costs not change, or at least not increase. Predicated upon these concerns, the Ministry gave its consent to the realignment. As in the health care sector cases referred to above. the third party involvement of the Ministry, with the requirement that its official approval be obtained, distinguishes this scenario from many other section 63 contexts. Here, the legal entitlement to provide the obstetrics and paediatrics services was, in part, transferred, through the mechanism of approval by the Ministry, from St. Mary's to Kitchener-Waterloo. Accompanying this transfer, the hospitals themselves made an arrangement which enabled these services to be transferred to Kitchener-Waterloo, and they co-ordinated the transferring of patients in the services in question. Indeed, due to funding restrictions, the Hospital could not have increased certain of its services, and numbers of beds, without reciprocal decreases in other services, and the transfer of those services to St. Mary's. The community at large was advised of the changes, and was told that all obstetrics and paediatrics services would, as of specific dates be performed only at Kitchener-Waterloo.
- 41. The Hospital submitted that to find a sale in these circumstances would mean that a "sale" would occur whenever a physician withdrew or transferred his or her medical privileges from one hospital to another. We do not agree. It is not critical in our view that the transfer was precipitated by the decision of the obstetricians to withdraw their services from St. Mary's. Parties for many reasons may decide to engage in a sale or transfer. The Board's task, in light of all the factors before it, is to determine whether or not a sale within the meaning of section 63 has occurred. The circumstances here indicate that such a sale has occurred, and this conclusion is not altered because the circumstances were prompted by the withdrawal of services. Even if the Plan was an unwilling response forced upon the hospitals by the promised withdrawal of services, the two hospitals still agreed to a realignment scheme and engaged in actions pursuant to it that constituted a "sale". A "sale" does not occur every time a physician "transfers" privileges to another hospital. But that is not all that happened here. The withdrawal of services was merely one factor in a much longer context. The fact remains that part of the "business" of St. Mary's was transferred to Kitchener-Waterloo.
- A2. Nor is it critical that no staff from St. Mary's were transferred over, on some seniority credit basis, to Kitchener-Waterloo. Certainly, the lack of transfer of employees is one factor to be considered. But it is only one factor, and must be assessed in the context of the entire transaction and in all the circumstances. The form of a transaction may not be particularly illustrative of the real transaction. It is the substance of what occurred that is important. If it were otherwise, and the Board looked only to the surface details, employers would be able to structure events in legal form in a manner that would ensure that a "sale" never occurred, even if in substance such a transaction had in fact resulted. Section 63 is designed to look beyond the outward structuring to the substance of the transaction, seen from the collective bargaining and labour relations perspective. It may well be, therefore, that the reasons for having made particular decisions as to the structuring of the transaction are relevant in a section 63 application in assessing the true heart and shape of the transaction. Evidence of why particular transaction events were so executed could well be relevant.

Here, even though there was no "transfer" of employees from St. Mary's to Kitchener-Waterloo, on all the facts, a "transfer" of part of the business has occurred. See, in this respect, *Metropolitan Parking*, supra, at paragraph 36, and *Daynes Health Care Limited* [1984] OLRB Rep. Aug. 1091.

- What occurred was not merely an expansion of Kitchener-Waterloo's existing obstetrics and paediatrics departments, although in the result the departments did expand, but an agreement between the two hospitals to transfer the business of the obstetrics and paediatrics departments from St. Mary's over to Kitchener-Waterloo. It would be artificial to describe the realignment Plan as a series of agreements whereby, under one agreement, a service would be closed down at one of the hospitals, and under another agreement, the other hospital would expand a similar service. Rather, these hospitals together agreed that, because of the inefficiencies of duplicated services. they would close down services and transfer those services to the other hospital. Through this arrangement of reciprocal movement between the two hospitals, Kitchener-Waterloo acquired the ability to expand its obstetrics and paediatrics departments. The hospitals arranged to transfer patients from the departments closed down at the particular hospital to the hospital where they remained open. The community was advised of this transferring of services. The Ministry gave its official approval to the transference of the legal entitlement from one institution to the other. Not only was the work of providing obstetrics and paediatrics services transferred over, but so too was the means to provide those services and the legal entitlement to perform that "business". In these circumstances, a sale occurred.
- The parties are agreed that if a sale is found (as we have), intermingling occurred. The facts support the parties' agreement. The Board concludes that intermingling has resulted from the sale, with the employees of the two businesses, formerly run by St. Mary's and Kitchener-Waterloo separately, now being intermingled by Kitchener-Waterloo, even though no nurses from St. Mary's were transferred over. In these circumstances, the provisions of section 63(6) of the Act apply.
 - (6) Notwithstanding subsections (2) and (3), where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,
 - (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);
 - (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
 - (c) declare which trade union, trade unions or council of trade unions, if any shall be the bargaining agent or agents for the employees in such unit or units; and
 - (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.
 - 45. We turn next to define the appropriate bargaining unit, as authorized by the provisions of section 63(6)(b). O.N.A. submits that the appropriate bargaining unit at Kitchener-Waterloo should encompass nurses in the obstetrics and paediatrics services. The Hospital asserts that the appropriate bargaining unit should be all nurses of the Hospital. There do not appear to be many prior cases on point. In *Hotel Dieu of Kingston* [1984] OLRB Rep. June 816, the Board had to deal with the exercise of its powers under subsection (4) of section 63 to define the like bargaining unit. The Board specifically noted that it was not determining the appropriateness of the bargaining unit

under subsection 63(6), which is the question before us. And see *City of Peterborough* [1979] OLRB Rep. Feb. 133. At St. Mary's, O.N.A. is the bargaining agent for both full time and part-time nurses. The collective agreements with respect to each of those bargaining units recognize O.N.A. with respect to "all lay, registered and graduate nurses employed by the hospital, engaged in nursing care, save and except head nurses and persons above the rank of head nurse." Both these bargaining units therefore are hospital wide, and are not structured by departments or services. At Kitchener-Waterloo, the nurses have been treated as in one unit, the entire hospital, for labour relations purposes, and they do transfer between services and departments. In effect, O.N.A. asks that we find appropriate a bargaining unit consisting of two departments only, within the overall nursing complement of the Hospital.

- As described in Hospital for Sick Children [1985] OLRB Rep. Feb. 266, the Board in 46. certification applications asks "does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer?" In certification proceedings, the Board is asked to describe an appropriate bargaining unit for previously unorganized employees (displacement applications raise different concerns). Accordingly, the Board looks at whether the unit sought by the union is an appropriate unit in the context of the initial granting of bargaining rights. But section 63 is designed to preserve existing bargaining rights, not grant new ones. The considerations applied by the Board in determining an appropriate bargaining unit, under section 63(6)(b), must therefore take into account existing bargaining structures. It may well be, therefore, that the Board will find appropriate a bargaining unit, where there has been intermingling under section 63, which it would not have found acceptable in certification proceedings. Too rigid an approach to describing the appropriate bargaining unit would undercut the purpose of section 63, to protect bargaining rights despite a change in legal ownership of a business. We must balance these two aspects, the need to protect bargaining rights and the need to determine an appropriate bargaining unit.
- O.N.A. We do not consider a bargaining unit consisting only of two departments in a multi-department, multi-service hospital to be appropriate. In our view it would lead to undue fragmentation, and would likely result in serious labour relations problems for all parties. Bargaining units in hospitals are generally defined in terms of "all nurses", or "all employees employed in a nursing capacity", without differentiation based solely upon the department or departments in which particular nurses work at a given point in time. In hospital settings throughout the province, as reflected at St. Mary's where O.N.A. represents the nurses, the employers and the union have generally not delineated units on a departmental basis, for to do so is neither consistent with the administrative operation of hospitals nor to the benefit of the nurses represented by a trade union. Such fragmentation may well impede a nurse's ability to move to other departments within a hospital. It may also seriously impede the efficient running of the hospital.
- 48. O.N.A. and both St. Mary's and the Hospital treated their nurses as falling within an "all hospital" or "all nurses" grouping. We conclude similarly, given the context in the hospital sector, that the appropriate grouping would be of all the nurses at Kitchener-Waterloo, and not only those in obstetrics and paediatrics. We therefore conclude that the appropriate bargaining units will generally be described as all nurses engaged in a nursing capacity at Kitchener-Waterloo. For reasons that follow, we need not finalize the precise description of the bargaining unit, nor decide whether there should be both a full-time and part-time bargaining unit. (We note that the parties' submissions did not distinguish between the full-time and part-time nurses or units). In so deciding, we are cognizant of the fact that such a bargaining unit here may lead to the extinguishment of O.N.A.'s bargaining rights. But in the hospital sector, and given the evidence, to find

appropriate a unit of only the nurses in obstetrics and paediatrics would create serious labour relations problems.

- 49. We consider next whether a vote ought to be directed. The vote would ask nurses whether they wished to be represented by the applicant. Ordinarily in cases of intermingling, the Board considers the relative percentages in the voting constituency of the unionized and non-unionized employees in determining whether or not to direct a representation vote.
- 50. In Bermay Corporation Limited [1980] OLRB Rep. Feb. 166, the Board wrote as follows:
 - 21. When, as in this case, the employees are drawn from two sources, one of which has not had collective bargaining, the Board may consider whether it is appropriate to exercise its discretion under section [63] to terminate a union's bargaining rights and, with them, its collective agreement. It may do so directly, without a vote, when a union represents only a small percentage of the employees. (e.g. *The Corporation of the City of Mississauga* [1974] OLRB Rep. Mar. 184). Where, however, a substantial number of the employees have been represented by a union, the Board may take a representation vote among the employees to assist it in that determination. That is what was done in this case.
- 51. In Silverwood Dairies [1980] OLRB Rep. Oct. 1526, the Board wrote:
 - 26. The Board must now determine whether a representation vote should be taken of the employees in bargaining unit #1. Where an intermingling has occurred within the meaning of section [63](6) and some of the intermingled employees are represented by one trade union while others are represented by another trade union, the Board has a discretion to direct that a representation vote be taken to enable the intermingled employees to choose which of the two trade unions will be their bargaining agent. However, where there is a large disparity in the size of the intermingled groups of employees, the Board will generally not direct that a representation vote be taken, but rather will declare that the trade union representing the great majority of employees is to be the bargaining agent for the new bargaining unit...
 - 27. The Board had not specifically defined the minimum proportion of employees in the intermingled bargaining unit which a trade union must have represented prior to the intermingling for a representation vote to be appropriate. However, specific cases in which the Board has directed or refused a representation vote as a result of the degree of representation enjoyed by each of the competing trade unions provide some guidance as to the applicable parameters. In Alcan Building Products, [1968] OLRB Rep. May 212, an employer closed its window division and terminated all of the employees in that division. The employer's siding division took over the premises and rehired sixteen of the former window division employees who, together with the siding Division's work force of twenty-seven employees, became part of a total work force of forty-three employees. The Board found that a sale of a business and an intermingling of the employees of the two businesses had occurred. On the basis of respective representation of 37 per cent and 63 per cent of the employees by the competing unions, the Board directed that a representation vote be held. In the Borden case, [1970] OLRB Rep. Jan. 1244, the Borden Company Limited sold the Brantford area home delivery routes portion of its business to Silverwood Dairies Limited. The Board ordered a representation vote when the purchaser intermingled the ten employees formerly employed by the vendor with the purchaser's twenty-six employees at Brantford. Thus, representation of approximately 28 per cent of the employees in the new bargaining unit was held to be sufficient to justify a representation vote. In Bryant Press Limited, [1972] OLRB Rep. Apr. 301, a vote was ordered where the trade union represented only about one-third of the intermingled employees, the remaining two-thirds having not been represented by any trade union. Similarly, where "roughly one-third" of the employees in the new bargaining unit were represented by the applicant trade union, the Board found it to be "a proper case to conduct a representation vote" in the Canadian Trailmobile case, supra.
 - 28. In *Mountain View Dairy Limited case*, *supra*, at paragraph 9, the Board declined to direct a representation vote where the applicant trade union represented only eight of the approximately sixty employees in the new bargaining unit, and declared the respondent trade union, which rep-

resented the remaining employees, to be the bargaining agent for the employees in the intermingled bargaining unit. Moreover, the Board suggested in that case that it would have disposed of the case in the same manner even if the respondent trade union had represented only seventy-five per cent of the employees in the new bargaining unit and the applicant trade union had represented twenty-five per cent. However, in *Middlesex-London District Health Unit*, [1971] OLRB Rep. Sept. 560, a vote was ordered despite the fact that the applicant trade union represented only about twenty-five per cent of the employees in the new bargaining unit. Similarly, in *The Regional Municipality of Waterloo and the Corporation of the City of Cambridge*, [1973] OLRB Rep. June 302, the Board directed that a representation vote be taken where one of the two competing trade unions represented twenty-four of the thirty-three employees and the other trade union represented only the remaining twenty-seven per cent of the employees.

- 52. Here, if a vote were to be directed, it would be directed of those nurses properly falling within the all nurses bargaining unit(s) at the hospital. The total number of nurses at Kitchener-Waterloo, full-time and part-time, is approximately 807. We must determine how many of the 807 nurses are nurses or positions which O.N.A. represents. On the facts, 74 positions in obstetrics and paediatrics were created at the Hospital as a direct result of the "sale". Regardless of who actually has filled those positions, given our "sale" finding, 74 positions were transferred over. The union at best therefore represents, in effect, 74 employees at Kitchener-Waterloo. The union thus represents 74 out of 807 nurses, or approximately 9% of the bargaining unit.
- 53. Such a small percentage of the bargaining unit represented by O.N.A. would not lead us to direct that a representation vote be held. And even if we took the union's best position on the numbers, and accepted O.N.A.'s argument that all 110 nurses in the obstetrics and paediatrics departments at St. Mary's should be considered, the applicant would represent only approximately 14 per cent of the nurses, again too small a number to direct a vote.
- 54. In these circumstances, we decline to direct a representation vote and we declare that O.N.A. is not the bargaining agent for any of the Hospital's nurses and that the applicable collective agreement is no longer binding.
- An issue remains as to the effect of these declarations. Under section 63(2), where the Board determines (as we have) that a sale of a business has occurred, "the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement ..." Under section 63(6) the Board can declare that they are "no longer bound by the collective agreement". O.N.A. submits that once a "sale" is found, the collective agreement must be applied even though the Board subsequently declares that O.N.A. is not the bargaining agent and that the collective agreement no longer applies. Although we have so declared, O.N.A. asserts that when the new nursing positions in obstetrics and paediatrics at the Hospital resulted from the sale, they nevertheless had to be filled in accordance with the collective agreement. (See Bermay Corporation Limited, supra, at paragraph 33). The Hospital and the Intervenors both argue that, even if a "sale" is found, the collective agreement should not be applied to cause a re-staffing of the obstetrics and paediatrics services at Kitchener-Waterloo unless and until it is established that O.N.A. will have bargaining rights at the Hospital. As can be seen, each party has made assertions on whether the collective agreement ought to be applied in the period between the date of the sale and the declarations issuing. But none of the parties has directly addressed whether the declarations are effective only as of the date of the decision, or can be effective at an earlier date, which is the issue implicitly raised in the parties' submissions. We have not had the benefit of their views on the Board's jurisdiction to make the declarations effective at other than the date of our decision, nor, if we have the authority, how we ought to exercise that discretion here. This is a significant policy issue, with potentially significant ramifications for the parties and the nurses concerned. Although the matter has been raised, we are not satisfied that the parties turned their minds to the precise issue described above.

- 56. In these circumstances, should the parties be unable to resolve all remaining matters, these proceedings are to be relisted, at the request of any of the parties, to deal with the issue of the date as of which our declarations that O.N.A. is not the bargaining agent and that the collective agreement no longer applies are to be effective, and any other matters arising from this issue.
- 57. We turn finally to a consideration of the section 89 complaint.
- With respect to the alleged breaches of sections 50, 64 and 67 of the Act, our decision on these issues must await a decision as to the effective date of our declaratory relief. Whether or not the Hospital breached these sections may well depend on whether a collective agreement was applicable at the relevant time (when the newly-created jobs were posted and filled) and on whether O.N.A. was at the time bargaining agent for any nurses at the Hospital. We remained seized for these issues and we reserve our decision on these alleged breaches, and any appropriate remedial relief.
- We next consider the allegation that Kitchener-Waterloo breached section 66 of the Act. The Hospital had taken the position that the collective agreement did not apply, that there had been no sale. The Hospital's evidence was that it was concerned that hiring nurses from St. Mary's on any transfer arrangement would result in a situation where O.N.A. represented some of the nurses in the obstetrics and paediatrics units and other nurses working beside those nurses would be unrepresented. In the Hospital's view, this would present significant administrative difficulties. The Hospital denied that this concern formed any part of the reason for its decisions to first offer all the positions internally or to subsequently treat St. Mary's applicants on the same basis as new hires from the general community. But we must assess this evidence in the context where the Hospital had previously been prepared to give some preference to these nurses. In all the circumstances, we conclude that the Hospital did not hire St. Mary's nurses, at least in part, only because they were represented by a trade union. Kitchener-Waterloo had been quite prepared to hire them, indeed to prefer them in some fashion, when it did not realize that O.N.A. was asserting representation rights. It was of this view as late as May 23, 1989. On that date, it learned that O.N.A. would be asserting successor rights. Shortly thereafter, it decided not to hire them. That decision was in breach of section 66.
- After deciding to give some preference to St. Mary's nurses, and when it learned about a potential successor rights claim, the Hospital altered its position and decided not to favour the nurses represented by the applicant. It did so because the person making the effective decision for Kitchener Waterloo concluded that hiring St. Mary's nurses would create significant administrative difficulties for the Hospital because they were unionized. Ms. Skelton-Green testified that she believed this to be the case, that it would mean organized and unorganized nurses working side by side in obstetrics and paediatrics. We do not find nor suggest that she engaged in a nefarious scheme to deprive O.N.A. or the nurses it represented of their rights. But even if her belief was accurate (and we note that section 63 is designed to deal with such concerns), it cannot justify a decision that deprived St. Mary's nurses of an opportunity they would otherwise have had to apply for the jobs. St. Mary's nurses were discriminated against because O.N.A. represented them.
- After posting the new positions internally, the Hospital then advertised the remaining vacancies on an external new hire basis. No logical reason was provided for the decision by the Hospital to not give, at that stage, some preference to St. Mary's nurses over external nurses. Ms. Skelton-Green testified that there were only two reasons for the decision to treat the St. Mary's nurses as new hires along with strangers to either hospital. First, the Hospital did not wish to antagonize nurses in the community who had not been previously connected to either hospital, and who might feel slighted by preference given to St. Mary's nurses. Second, the Hospital remained

concerned that budgetary requirements would cause lay-offs in the future, and it wanted to continue to protect its own nurses should such lay-offs occur. It felt that if it hired St. Mary's nurses, with any recognition of their high seniority, the result might be that Kitchener-Waterloo nurses would subsequently have to be laid off. Neither reason is credible. The Hospital had previously favoured some sort of transfer arrangement with St. Mary's nurses. There had been no concern at that time with respect to the feelings of nurses unrelated to either institution. All the options being favourably considered then had involved some sort of preference to the nurses of the two institutions over unconnected nurses in the community. The Hospital only expressed such a concern after hearing of O.N.A.'s position. It is particularly difficult to give any credence to this reason when it remained true that the St. Mary's nurses were the most qualified for the new positions. Indeed, this is demonstrated by the fact that all 42 of the St. Mary's applicants were first offered the new positions. The second reason provided is even less credible. Even if Kitchener-Waterloo wanted to protect its nurses from future lay-offs, and not confront the situation where nurses who had come over from St. Mary's would keep jobs while nurses who had always been at Kitchener-Waterloo were laid off, it was completely unnecessary to treat St. Mary's nurses as new hires on the same basis as strangers. It was only necessary to ensure that the St. Mary's nurses had less seniority than the existing Kitchener-Waterloo nurses. The Hospital could have protected its nurses, and still given preference to the more skilled St. Mary's nurses over nurses unconnected to either hospital, simply by giving St. Mary's nurses seniority dates that ran from date of transfer. The Hospital offered no explanation for why it did not do this.

- In our view, it treated St. Mary's nurses as new hires on the same basis as strangers because it was trying to structure the transaction in such a fashion that it would not look like a "sale" under section 63 of the Act. It wanted to create a staffing of the expanded services that did not look as though any employees from St. Mary's had "transferred" over from that hospital to Kitchener-Waterloo. This decision was also in contravention of section 66. We do not suggest that parties engaging in transactions that might be the subject of section 63 applications cannot structure the transaction in a manner they consider appropriate. Indeed, the provisions of sections 63 and 1(4) of the Act are designed to preserve bargaining rights, regardless of the structuring by the parties of such transactions. Ordinarily, parties so structuring their transactions will not commit a breach of the Act through that structuring alone. However, here Kitchener-Waterloo had earlier decided that the St. Mary's nurses ought to be afforded some preference in hiring over external candidates. They had decided so for sound business reasons, as the St. Mary's nurses were the most qualified and could provide the best patient care at the lowest cost. Those were the reasons then motivating Kitchener-Waterloo. Then, after deciding to give preference to St. Mary's nurses, Kitchener-Waterloo made the decision to treat St. Mary's nurses the same as new hires who were strangers because it didn't want O.N.A. to be successful in its section 63 application. They still hired them all before any outside nurse. But this way, calling them and treating them as new hires along with third party nurses, it would not look as if the nurses had "transferred" or been intermingled. It would not look as if they were "St. Mary's nurses". In short, Kitchener-Waterloo discriminated against the nurses at St. Mary's precisely and only because they were represented by O.N.A. There is no doubt that had the nurses at St. Mary's been unrepresented, Kitchener-Waterloo would have afforded them some form of transfer or seniority rights or preferential opportunities to bid for the new jobs, compared to outside hires.
- 63. These findings that the Hospital breached section 66 in its filling of the newly-created positions do not depend on a finding that O.N.A. had bargaining rights with the Hospital at the relevant time, or that the collective agreement was then applicable. Whether or not it was then effective, or for that matter, whether or not a "sale" occurred, the fact remains that the Hospital discriminated against the St. Mary's nurses in obstetrics and paediatrics because they were unionized. This is, in the circumstances, a breach of section 66.

- While the question of the breach of section 66 is independent of whether the collective agreement was then applicable and whether O.N.A. then had bargaining rights, the question of the appropriate remedy may well be dependent upon resolving those matters. In terms of the appropriate remedy with respect to the breach of section 66, the Board would try to place the applicant, and the employees represented by the applicant who might have suffered as a result of Kitchener-Waterloo's breach of the Act, in the position they would have been in but for the breach. But that position could vary depending on whether the newly-created positions had to be filled according to the collective agreement. It was only in how it filled the newly-created positions that the Hospital breached section 66. If it had to fill them according to the collective agreement, there may be no remedial direction for the breach of section 66. In light of our decision reserving on the applicability of the collective agreement and on whether there has been a breach of sections 50, 64 or 67, we also reserve on and remain seized with respect to the question of the appropriate remedy for the breach of section 66.
- 65. Therefore, subject to our comments above, this matter is to be remitted to the parties for their consideration. The Board will remain seized with respect to the remedial aspects and those other matters identified above.
- 66. Finally, Kitchener-Waterloo submits that any remedial relief under section 89 ought to be reduced because of the delay caused by O.N.A. during the instant proceedings. We need not deal with this matter now, since in the result there may be no damages owing to any of the nurses in question, and in any event, that is a remedial issue and we have remitted this question to the parties at this stage. However, to assist the parties in resolving the remaining matters, our initial sense is that we are not inclined to reduce the amount of damages otherwise appropriate. Assuming for the moment that counsel's conduct inappropriately caused delay, we are not disposed to lessen the damages a nurse might be entitled to because of conduct of counsel during the litigation. We would be reluctant to penalize those entitled to remedial relief for any such reason.

DECISION OF BOARD MEMBER JAMES A. RONSON; October 15, 1991

- 1. I agree with my colleagues that this matter may be scheduled, on request, for hearing with respect to further submissions on the effect of section 63 of the *Labour Relations Act*.
- 2. With respect to their other conclusions, I cannot agree and will provide my reasons at a later date.

2156-90-R; 2402-90-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. 713537 Ontario Inc. c.o.b. as H.T. Lawrence Excavating, Respondent; Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. 713537 Ontario Inc. c.o.b. as H.T. Lawrence Excavating and 756298 Ontario Ltd. c.o.b. as Lawrence Construction, Respondents

Certification - Construction Industry - Related Employer - Reply to union's certification application stating that employer in "construction management" business and employing no labourers - Construction company becoming management company without construction employees and its owners setting up second company as operating company employing construction personnel - Union seeking relief under section 1(4) of the Act - Board rejecting argument that section 1(4) application not properly before it in context of certification application - Related employer declaration issuing - Certificates issuing

BEFORE: Inge M. Stamp, Vice-Chair, and Board Members W. H. Wightman and P. V. Grasso.

APPEARANCES: Elizabeth Mitchell, Robert Leone and James Rodey for the applicant; W.R. Herridge, Q.C. and Domenic Vozza for the respondents

DECISION OF VICE-CHAIR, INGE M. STAMP AND BOARD MEMBER, P. V. GRASSO; October 28, 1991

- 1. This is an application for certification (Board File No. 2156-90-R) in which the respondent 713537 Ontario Inc. c.o.b. as H.T. Lawrence Excavating (hereinafter referred to as "Excavating") takes the position that it is not the employer of the employees affected by this application.
- 2. In its reply Excavating stated its business is "construction management" and that "no unit of labourers is appropriate since the respondent does not employ labourers." The reply further stated that "Respondent believes applicant is making application for certification for the wrong company."
- 3. The applicant requested relief under section 63/1(4) of the Act (Board File No. 2402-90-R). It is the applicant's position there has been either a sale of a business between Excavating and 756298 Ontario Ltd. c.o.b. as Lawrence Construction (hereinafter referred to as "Lawrence Construction") or that these two entities are one employer for the purpose of the *Labour Relations Act* and are carrying on associated or related businesses or activities under common direction and control within the meaning of section 1(4) of the Act.
- 4. At the hearing of these matters counsel for the respondents submitted that in the present circumstances section 1(4) is inherently inapplicable as the purpose of section 1(4) is not to expand a union's bargaining rights but to prevent erosion of the union's bargaining rights. Counsel disagreed with the *Atway Transport Inc.* decision, [1989] OLRB Rep. Feb. 101. Counsel submits the Board in *Atway*, (*supra*) proceeded on a wrong principle. A rule of the Board's should not be interpreted as to alter the meaning of a statutory provision. It is the statutory provision that governs and the rule is subordinate to it.
- 5. Counsel for the respondent refers the Board to Landmark Contracting Ltd., [June 1990] OLRB Rep. 660 which refers to the decision in The John Hayman & Sons Company Limited, [1984] OLRB Rep. June 822 and specifically the criteria set out therein:

- "(1) whether the applicant is seeking to acquire bargaining rights by means of section 1(4) in order to avoid the certification procedures of the Act;
- (2) whether a declaration would disturb existing bargaining rights;
- (3) whether a declaration would interfere with the interests and rights of employees to select their own bargaining representative or to remain unrepresented;
- (4) whether the application has been made within a reasonable time after the applicant became, or with reasonable diligence, should have become aware that the two or more entities were closely related; and
- (5) whether a scheme exists which would effectively defeat bargaining rights by transferring work from one related entity to another."
- 17. In Donald A. Foley Ltd., [1980] OLRB Rep. April 436, the Board stated:

"One of the significant purposes of section 1(4) is to guard against the dilution or undermining of bargaining rights already obtained such, for example, as occurs when work is diverted from a unionized employer to an associated, newly created non-union one as in *Evans-Kennedy Construction Limited*, [1979] OLRB Rep. May 388; or when there is a risk or threat that bargaining rights may be eroded, as in *West York Construction Limited*, [1978] OLRB Rep. Sept. 879. For a more detailed review of the purpose of section 1(4), however, see *Industrial Mine Installations Limited*, [1972] OLRB Rep. Oct. 1029 at paragraphs 9 to 13 inclusive."

- 6. Counsel for the respondent submits the applicant is endeavouring to expand its bargaining rights by substituting section 1(4) for the normal course of certification. Counsel referred to Eighty-Five Electric, [1987] OLRB Rep. June 833 for the proposition that if there are no valid bargaining rights there can be no section 1(4) application. Counsel submits the applicant should have applied for certification with respect to Lawrence Construction. The applicant is endeavouring to use section 1(4) as a substitute to certification. Sack and Mitchell states the Board will not exercise its discretion under 1(4) as a substitution for a certification. Counsel submits that the Board's jurisprudence as a whole and the statements in Sack and Mitchell remain good law and asks the Board to dismiss the section 1(4) application.
- 7. Counsel for the applicant submits that Atway, (supra), has already dealt with this issue. The purpose for section 1(4) is to prevent the application for certification being rendered meaningless by the respondent using another entity to carry on its business and operating double breasted. The applicant agrees there are no established bargaining rights to undermine, however the applicant submits it wants to protect the bargaining rights if it does acquire them. The section 1(4) in Landmark, (supra) deals with grievances and not in the context of a certification application. Similarly Hayman, (supra) dealt with existing bargaining rights. The applicant submits it is not avoiding a certification application. This is an application for certification and the issues have been raised by the respondents' position. The issue before the Board is what is the correct name of the respondent, is it Excavating or Lawrence Construction or is it both?
- 8. Counsel for the applicant submits the Board has before it a certification application with membership evidence signed by employees wishing to be represented by a particular trade union. Those wishes should not be ignored based on a technical argument by the respondent that its not the named respondent and the applicant should be barred from applying under section 1(4). Counsel submits if the Board only grants the certificate in one name or the other the employer can cease to use that company and render the certificate meaningless. There is a limit to what a trade union can know about a respondent's operation and provided a trade union acts in good faith, which to the best of its knowledge is the employer of the employees, where there are related employers it is

appropriate for the applicant to raise section 1(4) to remedy any mistakes made. This is thoroughly dealt with in *Atway*, (*supra*).

- 9. Counsel submits it is appropriate for the applicant to raise section 1(4) in this certification application in response to the reply raised by the employer and it is most inappropriate to suggest there is a bar to using section 1(4). The comments in *Sack and Mitchell* are not relevant. The applicant is not trying to avoid certification. This is a new certification application. There are no previous applications or delay. Counsel submits it is not relevant that bargaining rights are new bargaining rights. The respondent's preliminary motion should be dismissed.
- 10. In reply counsel for the respondent submitted that *Eighty-Five Electric*, (supra) and Atway, (supra) are inconsistent that if there are no bargaining rights there can be no section 1(4) declaration. The Board should look to subsequent cases. Landmark, (supra) is very consistent with Eight-five Electric but is inconsistent with Atway, (supra). If there is a technicality it is the way labour law in Ontario has developed in the construction industry. You take the unit as you find it on the application date. The Board should prefer the authority of Eight-five Electric and subsequent jurisprudence to the authority of Atway.
- 11. The Board gave a unanimous oral ruling that the section 1(4) application in the context of the certification application is properly before it. The Board proceeded with these matters. Counsel for the respondent requested reasons for the Board's ruling which we will give later in the decision.
- 12. Exhibits one to six were put in on agreement of the parties. The parties agreed that payroll records for Excavating would indicate only three employees:

Frank Vozza Domenic Vozza Diane Veenendaal

The parties further agreed that the payroll records for Lawrence Construction show:

James L. Rodey Jay Rodey Pampillio Rocca Carlos Dos Santos William Smith Messias Viera

and other construction personnel

- Counsel for the applicant submitted it was not necessary to determine who the employer is since the two entities were under common control and direction. Counsel referred the Board to Sutton Place Hotel, [1980] OLRB Rep. Oct. 1538. Counsel submits the section 1(4) declaration be made and the Board proceed to the other issues in the certification application. The respondent argued that it would be a denial of natural justice if the Board did not hear the evidence. It is only after the evidence has been heard that the Board can exercise its discretion. The Board proceeded to hear the evidence with respect to the section 1(4).
- Domenic Vozza testified that he did not know what his position or his brother Frank's position is but that they each own half of each company. Excavating was incorporated in August 1987, showing D. Vozza as President. The address is 1187 Telfer Sideroad in Sarnia. Lawrence

Construction was incorporated in January 1988. The directors are Frank and Domenic Vozza, at 415 George Street, Sarnia. Frank Vozza was shown as President and Domenic as Secretary and Treasurer (Exhibits two and three).

- 15. Prior to the certification application Excavating was involved in a watermain job for approximately two million dollars and employed construction labourers. However, Excavating does not employ any construction labourers at the present time.
- Due to a late client payment Excavating fell behind in their Workers Compensation Board ("WCB") payment. At that point the two brothers decided to set up a management company with no employees so that they could obtain work and Excavating became a holding company without construction employees. Lawrence Construction was set up as the operating company. Lawrence Construction became the employer of construction personnel including labourers and operating engineers and it was Lawrence Construction that made remittances to WCB. Excavating makes WCB remittances for the office staff including the two Vozza brothers. Excavating was reinstated at WCB in 1987/88 but has not employed any construction workers.
- 17. There was no suggestion that the corporate arrangements were made to defeat the trade union. Cheques were put in evidence showing that Lawrence Construction has been paying employees working in construction since September 1989. The two companies have separate mail boxes.
- 18. The project that was the subject of the application for certification is a watermain construction project in Sarnia at Colbourne Road and Indian Road. Contract No. 8 1990 was awarded to Excavating. Employees of Lawrence Construction performed the work. There was no subcontract between the two entities for this project. Lawrence Construction bills Excavating for work done and for equipment rentals.
- 19. Domenic Vozza testified that Excavating sub contracted work to other contractors in addition to Lawrence Construction. Excavating obtains and manages contracts and subcontracts work. Domenic Vozza runs Excavating and Frank runs Lawrence Construction. Excavating has been in operation for two to three years and Lawrence Construction for less than two years. Excavating has not employed any construction labourers for the last two to three years.
- 20. Frank Vozza works part-time for Excavating and is also employed by Lawrence Construction. Excavating's business includes equipment rental, maintenance, some trucking and obtaining construction contracts. Some contracts are obtained by tender, some without formal tender or bids. The equipment rented out by the hour includes backhoes, loaders, dozers, rubber tired backhoes. Excavating also owns storage vans, trucks and hauls gravel/clay for other companies and handles equipment removal. Lawrence Construction owns some vehicles and small equipment such as pumps and generators.
- 21. In addition to Lawrence Construction, Excavating subcontracts to Nordell, Abel Kramer, Don Severin Construction as well as a number of others. If its a new subcontractor a purchase order is issued if Excavating knows the subcontractor its done by verbal agreement.
- 22. Any road and underground work is sublet to Lawrence Construction. Domenic Vozza decides which portion of the work is subcontracted to Lawrence Construction versus some other company. On one project Lawrence Construction may be excavating houses and do a different kind of work on another project. Lawrence Construction does not have the expertise to do road work. Excavating rents out equipment to other companies. Lawrence Construction's operating engineers use equipment supplied by Excavating as well as other equipment. Lawrence Construction

tion rents equipment from wherever it is available including Excavating. Labourers work with the operating engineers when laying pipe.

- Both brothers operate equipment and perform labourers work on occasion. The foremen at Lawrence Construction are Frank Vozza and J. Rodey and on occasion Frank Ferreira. Domenic was on the site at Colbourne Road. The evidence was that Domenic would look after the Lawrence Construction's or Severin's, (one of the sub-contractors) crew, if required, for short periods.
- 24. Exhibit 8, the covering page for the income tax returns of Lawrence Construction employees shows Domenic Vozza as "person from whom further information may be obtained regarding the T4-T4A return". The contact person for Excavating on the tax return is shown as D. Veenendaal. D. Veenendaal does the bookkeeping for both companies. Each company retains its own accountant and lawyer.
- 25. Lawrence Construction has obtained jobs that did not involve Excavating and it was Domenic Vozza's evidence he does not visit those sites. Domenic Vozza decided to subcontract certain portions of the work on the Colbourne Road job involving curb work. Lawrence Construction does small amounts of curb work but it is not part of their expertise. Lawrence Construction did the excavating of the trench and laying of the pipe on the Colbourne job. Other parts of the job were subbed to various contractors.
- 26. One of the business addresses listed for Lawrence Construction is 415 George Street which is Frank Vozza's residence. That was the address when the business started. The addresses in the articles of incorporation for Excavating is 1187 Telfer Road. This is the residence of Diane Veenendaal (more recently Mrs. Domenic Vozza) who looks after the payroll and the office. Pay cheques were either delivered to the job site or picked up at various addresses including the Telfer address or at Mr. Domenic Vozza's home.
- Jim Rodey testified he thought his employer was Excavating. He worked for Excavating from April 1990 to November 1990 when he was laid off. He heard about the job through his brother and went to see Domenic Vozza and was hired by Domenic. It was his understanding he was working for Excavating. Jim Rodey worked on a number of projects for the respondent. There were approximately five labourers in his crew at all times plus two operators and on occasion the two Vozza brothers would "run a machine". Domenic and Frank supervised the projects. Frank Ferreira was a leadhand or Foreman. Jim Rodey's pay cheques were issued showing a numbered company with no other identification. He did not receive any cheques showing the name Lawrence Construction. The first that this witness became aware of Lawrence Construction was through these proceedings.
- 28. It was Jim Rodey's evidence that he and his brother, Jay, would pick up their pay cheques at "Diane's" house on Telfer Road. Sometimes they had to wait until Domenic had signed the pay cheques. There were also times when the cheques were delivered to the job site. Jim Rodey always dropped his time cards off at the house on Telfer Road.
- 29. Both Domenic and Frank Vozza supervised the project at Colbourne Road. Frank Vozza would be at the Colbourne site for half the day. Both Frank and Domenic operated machinery on the Colbourne site.
- 30. Jim Rodey identified pay cheques given to his brother Jay with the same corporate number but also showing the name "Lawrence Construction" dated September 1989. When asked in cross examination the witness agreed that his brother might have been mistaken when he said he

was working for Excavating. Jim Rodey does not recall a sign at one of the residential projects displaying the company name. During cross examination the witness when asked what the name of his employer was on his tax return was evasive and replied that he gave his T4 to the person preparing his taxes and "all I do is sign it". In redirect Jim Rodey stated he never saw any Lawrence Construction sign or any corporate name on any vehicles or equipment.

- Robert Leone, Business Manager of Local 1089 testified that it was his understanding that the employer was Excavating. This understanding was derived from reading the Southam Building Reports, over a number of years, showing who has received various contracts. After speaking with the employees on site, the business manager understood they believed to be working for Excavating. There was no reference made to Lawrence Construction. The Operating Engineers have a collective agreement with Lawrence Construction in the Windsor area. It was Leone's evidence in cross-examination that he did not ask the Operating Engineers with which entity they had a collective agreement. It was his evidence that both unions have been trying to organize Excavating for many years. Leone testified any discussions that took place always referred to Excavating and that there were two brothers who were both involved in the business.
- In reply evidence Domenic Vozza testified that he had not hired Jim Rodey and he did not know him. Jim Rodey came to his girlfriend's house with Jay and Jay said his brother needed a job. Jay recommended him and Domenic Vozza said he would speak to his brother which he did. Domenic Vozza reiterated that time cards are picked up at the site but if there is no one at the site they are dropped off where Diane works.
- 33. The parties have agreed on a list of employees as follows:

Carlos Dos Santos Jay Rodey James Rodey Wm. Smith Messias Viera

Argument

- Ounsel for the applicant submits both Excavating and Lawrence Construction should be named as respondents and a certificate issued. These are clearly associated or related businesses under common direction and control. Both carry on businesses in the construction industry for the benefit of the same principals, Domenic and Frank Vozza. One company is the payroll company and Excavating acts as a general. The inner workings of the company are not apparent to the employees at large. The two companies have one bookkeeper. The pay cheques in 1990 do not show any company name. Both Frank and Domenic sign pay cheques and they are picked up from the bookkeeper. Excavating gets the contracts for the work and Domenic Vozza decides which portion goes to Lawrence Construction. Lawrence Construction employs operating engineers but does not own any equipment. It may rent equipment from Excavating or other suppliers. Lawrence Construction is subsumed in the public enterprise Excavating. Day to day direction and control of the labour force is by Domenic and Frank Vozza. If you do not accept Jim Rodey's evidence on the circumstances of his employment on Domenic's own evidence he recommended that he be hired.
- 35. Section 1(4) of the Act allows the Board to find that two employers are related for any purpose of the Act and this certification application is an appropriate purpose and the Board should find these businesses are under common direction and control. When a section 1(4) is made

in the context of a certification application the Board looks at different factors. The applicant submits the Board should look at

- (a) excessive delay
- (b) relying on section 1(4) to bar another trade union; and
- (c) labour relations considerations would collective bargaining be placed on a sounder footing if the section 1(4) is allowed. (*Industrial Mines*, [1972] OLRB Rep. Dec. 1029) Similar result in *Gottcon Contractors Limited*, [1990] OLRB Rep. Jan. 25.
- 36. Counsel submits if this application is not allowed the applicant's bargaining rights are at risk. *J.H. Norwich*, [1979] OLRB Rep. Dec. 1176, paragraph 2, *Bright Veal Packers*, [1981] OLRB Rep. Mar. 247, paragraph 11. To avoid uncertainty in the bargaining unit in the future the application should be allowed naming both companies as the respondents.
- Counsel for the respondent submits the Board should adopt the reasons in Landmark, 37. (supra), to the instant case and decline to make a related employer declaration. For labour relations purposes Excavating and Lawrence Construction are as different as night is from day. Counsel points out that Lawrence Construction employs construction labourers Excavating does not. Counsel submits Lawrence Construction is a construction industry employer as defined in section 1(1)(f) of the Act and Excavating is not a construction industry employer. Section 1(1)(f) states "construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewer, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof." Lawrence Construction performs the work "at the site thereof", Excavating does none of these things "at the site thereof" being a construction management company. It sends a subcontractor who may be at arms length or a related subcontractor to do the site work for it. As in the Landmark, (supra), case if there is any presence on the part of Excavating on the site, whether or not Excavating falls within the ambit of the construction industry, it is management personnel only. There are no bargaining unit persons or employees of Excavating as defined in the Act present at the site, only managerial employees. Section 1(4) should not be applied as Lawrence Construction is a construction employer and Excavating is a non-construction employer. If Excavating were organized it would be for an office workers unit only.
- 38. Respondent's counsel further submits that while Excavating subcontracts all of its work, Lawrence Construction is only one of the subcontractors it uses. Excavating rents equipment to independent third parties and is engaged in trucking operations and the rental business which are outside the ambit of construction set out in the Act. There is no valid labour relation reason for granting the section 1(4) just because the applicant applied for the wrong company. Counsel reviewed the evidence and submits the right remedy was to re-apply in the correct name and using the same cards. The concern expressed by the applicant with respect to protecting its bargaining rights if only one entity is certified is addressed in Landmark (supra) where the Board said if the respondent changes its operation so as to affect the union's bargaining rights the applicant could bring a fresh section 1(4) application.
- 39. The reasons for setting up the corporate structures was as a result of a problem with WCB which has since been remedied. Counsel for the respondent submits that another trade union's bargaining rights have not been eroded as a result of Excavating becoming a management company. There is no evidence that the corporate structure came into existence for any anti-union purposes. Counsel submits that while the two entities are under common control the Board in the

exercise of its discretion should decline to make such a declaration. These companies are not interdependent. Each entity can carry on business on its own. Excavating can carry on as a construction management company subcontracting to arms length subcontractors. Similarly Lawrence Construction can carry on its business hiring construction labourers directly and renting equipment as needed from third parties. The evidence does not bear out the applicant's position that they are a single integrated enterprise.

- 40. Counsel reviewed the evidence with respect to James Rodey and urged the Board not find him a credible witness with respect to his knowledge of who he believed to be his employer. The evidence was that his brother, Jay, a long time employee of Lawrence Construction introduced James Rodey to Lawrence Construction. Counsel further submits that the 1989 J. Rodey cheques are irrelevant.
- 41. If the applicants had named the proper respondent on the facts before the Board there would have been no basis to make a section 1(4) order against Excavating. There is no evidence of any scheme to shift construction workers form Lawrence Construction to Excavating. These entities existed before the union entered the picture. (See *Landmark*, *supra*). There is no evidence that the Operating Engineers were adversely affected by this corporate structure. Had Lawrence Construction been certified there would be no labour relation reasons to make an order against Excavating under section 1(4) and since Lawrence Construction has not been certified there is even less labour relations rational for making such an order.
- Respondent counsel submits *Industrial Mines*, (supra) is not applicable and cites Sack & Mitchell (page 371) "will not allow it (section 1(4)) to be used as a substitute for certification application. These entities have been in business for three or more years. There is no erosion of bargaining rights as no bargaining rights exist for the applicant. There is no evidence of erosion of bargaining rights for the Operating Engineers. While the condition precedent may have been fulfilled, counsel urges the Board that there is no labour relation reason for the Board in the exercise of its discretion to find that these two companies are one employer.
- In reply counsel for the applicant submits that the Board need not decide who the employer is of the five persons agreed to be on the list if they are "associated or related employers for the purpose of the Act." Counsel requests that should the Board decide that the applicant named the wrong party and the two companies are not one employer the applicant would request to amend its application because the union has made a *bona fide* mistake. Section 104 allows an applicant to amend its pleadings when there has been a *bona fide* mistake. Counsel submits there is no evidence with respect to the relationship between the Operating Engineers and the respondent. This application is between the Labourers and the respondent and the Operating Engineers facts may be quite different.
- Counsel for the applicant submits this case is not about preserving existing bargaining rights. This is an application for certification. The concern counsel submits, is that the respondent could change its corporate structure so that Excavating starts to employ labourers directly. Counsel replied to the respondents assertion that Excavating is not a construction industry employer citing the Board's jurisprudence including *The Corporation of the City of Etobicoke Public Library Board*, [1989] OLRB Rep. Sept. 935, *Tops Marina Motor Hotel*, [1964] OLRB Rep. Jan. 583, *The Corporation of the City of Toronto*, [1978] OLRB Rep. Dec. 1145. Counsel submits both entities are construction industry employers under the statute. Excavating is a general contractor who obtains the work and then sublets the work. There is no anti-union animus required to obtain a section 1(4) declaration. The motive is irrelevant. Counsel for the applicant submits this is an

appropriate case for the Board to exercise its discretion under section 104 if the section 1(4) is refused.

- 45. Counsel for the respondents takes the position that the Board should not amend the name of the respondent (in Board File No. 2156-90-R) and should dismiss the application. Counsel submits with due diligence the correct name of the respondent could have been ascertained.
- The Board's reasons for its oral ruling referred to in paragraph 11 above are set out below.
- 47. Section 1(4) of the Labour Relations Act states:
 - 1.-(1) In this Act,
 - (4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

[emphasis added]

48. Paragraph 7 of the *Atway*, (*supra*) decision states:

7. After identification of the issues we proceeded to hear counsel's submissions in respect of the most appropriate manner of proceeding in this matter. In addressing the manner of procedure, counsel for Atway raised as a preliminary matter, the jurisdiction of the Board to deal with the application under section 1(4) of the Act (Board File No. 1633-87-R) in the absence of an adjudication of the certification applications. At the conclusion of both counsel's submissions in respect of the manner of procedure, we rendered the following oral ruling:

We have before us ten applications for certification in which the applicant has requested that the Board conduct a pre-hearing representation vote. The applicant has also filed an application for a declaration under section 1(4) of the *Labour Relations Act* that the respondents to these ten applications constitute one employer for purposes of the Act.

The respondent Atway Transport Inc. (Atway) has argued that the Board is without jurisdiction to adjudicate upon the section 1(4) application until it has determined the applicant's right to be certified as bargaining agent for any or all of the respondents in the certification applications. The respondent Atway submits that one of the prerequisites to the Board issuing a section 1(4) declaration is that there exists *some* bargaining rights. The respondent Atway argues that the threshold question, or the foundation which must be established by the union *before* it can apply under section 1(4) is the union's right to represent *some* employees of any of the respondents whom it seeks to join in its section 1(4) application. Atway argues that the purpose of section 1(4) is to preserve bargaining rights, not to extend them and therefore the prerequisite is that the applicant union have some bargaining rights which it is seeking to preserve.

Atway argues that the appropriate order of procedure is to dispose of the certification applications first and to adjudicate upon the section 1(4) application only after the Board has dealt with the certification applications.

The applicant union made contrary submissions. The applicant argues that either the section 1(4) application should be dealt with first, separate and apart from the certifi-

cation applications. Alternatively, these matters should be dealt with together. The applicant points to Rule 31 which states:

Subject to the giving of notice and the provision of particulars, nothing contained in sections 27 to 30 shall prevent an applicant from claiming relief under subsection 1(4) of the Act in *any* proceeding under the Act.

The applicant argues that it is necessary for the Board to adjudicate upon the section 1(4) application in order to determine *who* is the employer of the employees on whose behalf the union seeks to acquire bargaining rights.

After having considered the submissions of the parties we have determined that the existence of some bargaining rights is not a prerequisite to the union's application under section 1(4). We agree with Mr. Dubinsky that Rule 31 permits the filing of the section 1(4) application at any time and in any proceedings under the Act.

We are of the view that section 1(4) specifically empowers this Board to grant a single or common employer declaration "for the purposes of this Act". In our view, such "purposes" include the purpose of dealing with, and disposing of, certification proceedings brought under the Act.

. . .

We adopt the reasons set out in Atway (*supra*). Paragraph 7 of that decision states "section 1(4) specifically empowers this Board to grant a single or common employer declaration "for the purposes of this Act". It goes on to say that "such purposes include the purpose of dealing with, and disposing of, certification proceedings brought under this Act. Subject to notice and other conditions as set out in the Rules of Procedure an applicant is entitled to claim "relief under subsection 1(4) of the Act *in any proceeding* under the Act. (emphasis added). This is consistent with the statutory provision.

Decision

- In the exercise of its discretion the Board must consider the purpose of section 1(4) in the scheme of the Act. This purpose includes the protection against the frustration of a trade union's efforts to gain bargaining rights (see paragraph 9 of *West York*, *supra*) and to protect against erosion of those bargaining rights. Domenic Vozza controls the work or contracts obtained by Excavating. He decides how the work is performed and who the subcontractors will be. Prior to the incorporation of Lawrence Construction, Excavating employed labourers directly. These two entities carry on "associated or related activities or businesses" in the construction industry. The contract for the "Watermain Construction on Colbourne Road and Indian Road" was awarded to Excavating.
- Board File No. 2156-90-R is an application for certification. In *Eighty-Five Electric*, (supra) the Board found that no bargaining rights existed and therefore the section 1(4) application was dismissed. *Landmark*, (supra) was a section 124 grievance in which the applicant could not show any erosion of their existing bargaining rights. Both these decisions address different issues than the instant applications.
- We are satisfied having regard to the evidence, the submissions of counsel and the cases cited that Excavating & Lawrence Construction are associated or related businesses under common control or direction. On the facts in this case we are satisfied that this is an appropriate case for the Board's exercise of its discretion to make the section 1(4) declaration. Therefore we find 713537 Ontario Inc. c.o.b. as H.T. Lawrence Excavating and 756298 Ontario Ltd. c.o.b. as Lawrence Construction constitute one common employer for the purposes of the *Labour Relations Act*.

- 53. We now turn to the certification application.
- The Board finds that Locals 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089 of the Labourers' International Union of North America, Ontario Provincial District Council are trade unions within the meaning of section 1(1)(p) of the *Labour Relations Act*. The Board further finds that the locals are constituent trade unions of the applicant.
- 55. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the Labour Relations Act and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on September 30, 1983, the designated employee bargaining agency is The Labourers' International Union of North America and The Labourers' International Union of North America, Ontario Provincial District Council.
- 56. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

- 57. The Board further finds, pursuant to section 144(1) of the Act, that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.
- The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 28, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
- 59. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:
 - ..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 55 above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

- 60. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent in all sectors of the construction industry in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.
- 61. The section 63 application is not relied on and is hereby dismissed.

DECISION OF BOARD MEMBER W. H. WIGHTMAN; October 28, 1991

- 1. I would adopt in full the representations made by counsel for the respondent.
- 2. In particular, I believe that to the extent Board decisions erode the earliest decisions affirming that section 1(4) was to be used as a shield and not a sword, that is to say not as a substitute for organizing, we send out a signal which is damaging to the prospective enterprise and, hence, to job prospects in the Province.
- 3. At the instance of application for certification there are no bargaining rights in existence to be protected. In such circumstances, and that is the factual situation before us, the applicant cannot succeed under section 1(4) and I would have so found.

3095-90-R; 3406-90-U; 0029-91-R Sudbury Mine, Mill and Smelter Workers Union, Local 598 of the Canadian Union of Mine, Mill and Smelter Workers, Applicant v. 390450 Ontario Inc. c.o.b. as Midas Muffler Long Lake, and 772312 Ontario Inc. c.o.b. as Midas Muffler Barrydowne, Respondents v. Group of Employees, Objectors; Sudbury Mine, Mill and Smelter Workers Union, Local 598 of the Canadian Union of Mine, Mill and Smelter Workers, Complainant v. 390450 Ontario Inc. c.o.b. as Midas Muffler Long Lake, and 772312 Ontario Inc. c.o.b. as Midas Muffler Barrydowne, Respondents; Sudbury Mine, Mill and Smelter Workers, Applicant v. 390450 Ontario Inc. c.o.b. as Midas Muffler Long Lake, and 772312 Ontario Inc. c.o.b. as Midas Muffler Barrydowne, Respondents.

Certification - Membership Evidence - Petition - Membership evidence bearing printed name of collectors but not their signatures - Board hearing oral evidence of the collectors - Cards submitted by the union held valid evidence of union "membership" - Board not satisfied that petitions representing voluntary statement of desire on the part of those who signed - Certificate issuing

BEFORE: Robert D. Howe, Vice-Chair, and Board Members R. M. Sloan and D. A. Patterson.

APPEARANCES: Rolly Gauthier and Alex Geauvreau for the applicant/complainant; Jack Braithwaite and Len Crocco for the respondents; Nick Marsales for the objectors.

DECISION OF ROBERT D. HOWE, VICE-CHAIR, AND BOARD MEMBER, D. A. PATTERSON; October 10, 1991

- 1. In a decision dated August 19, 1991, regarding these matters, we wrote as follows:
 - 1. The name of the applicant is amended to read: "Sudbury Mine, Mill and Smelter Workers Union, Local 598 of the Canadian Union of Mine, Mill and Smelter Workers". The names of the respondents are amended to read: "390450 Ontario Inc. c.o.b. as Midas Muffler Long Lake, and 772312 Ontario Inc. c.o.b. as Midas Muffler Barrydowne".
 - 2. File No. 3095-90-R is an application for certification in which the applicant (also referred to in this decision as the "Union") seeks bargaining rights for employees of the respondents. File No. 3406-90-U is a complaint under section 89 of the *Labour Relations Act* (the "Act") in which the Union alleges that the respondents contravened sections 64, 66, 70, and 71 of the Act, and in which the Union seeks to be certified under section 8 of the Act. File No. 0029-91-R is an application for an order under section 1(4) of the Act.
 - 3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the Act.
 - 4. Prior to the hearing, the parties met with a Board Officer and reached agreement on a number of matters, including the following:

The parties agree with each other that the respondents, 390450 Ontario Inc. c.o.b. as Midas Muffler Long Lake and 772312 Ontario Inc. c.o.b. as Midas Muffler Barrydowne, carry on associated or related activities or businesses under common direction and control and therefore constitute one employer for the purposes of the Ontario Labour Relations Act section 1(4) and request the Board to grant such relief, by way of declaration or otherwise, as the Board may deem appropriate.

Having regard to that agreement, the Board hereby declares that the respondents constitute one employer for purposes of the Act. (For ease of exposition, the respondents are also referred to as the "Employer" in this decision.)

5. Having further regard to the agreement of the parties, the Board finds that the following constitutes a unit of employees of the Employer appropriate for collective bargaining:

All employees of the Employer at 2055 Long Lake Road and 485 Barrydowne Road, in the City of Sudbury, save and except foremen, persons above the rank of foreman, the bookkeeper, employees regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period.

- 6. We are satisfied on the basis of all of the evidence before us that, irrespective of the status of Messrs. Marsales and Boucher, more than fifty-five per cent of the employees of the Employer in the bargaining unit, at the time the application was made, were members of the applicant on March 11, 1991, the terminal date fixed for this application and the date which the Board has determined under section 103(2)(j), to be the time for the purpose of ascertaining membership evidence under section 7(1) of the Act.
- 7. For reasons which will issue at a later date, we have concluded that there are no cir-

cumstances present in this case which warrant the exercise of the Board's discretion under section 7(2) of the Act to direct that a representation vote be taken.

- 8. A certificate will issue to the applicant for the bargaining unit described in paragraph 5 of this decision.
- 9. In view of the foregoing disposition of the Union's certification application, it is unnecessary for the Board to adjudicate the Union's request for certification under section 8 of the Act. It is also unnecessary for the Board to decide any other aspect of the Union's section 89 complaint, as Mr. Gauthier advised the Board during final argument that the declaratory relief requested in that complaint was only being sought in support of relief under section 8 and would be unnecessary in the event that the Union was otherwise certifiable without a representation vote. He further indicated that if the Union was certified without a representation vote, it would not pursue its challenges to the inclusion of Messrs. Marsales and Boucher on the Employer's list. Thus, it is unnecessary for the Board to decide that matter, since it is now common ground among the parties that Messrs. Marsales and Boucher are both properly included on the Employer's list.
- 10. Thus, the applications in File Nos. 3095-90-R and 0029-91-R are granted, and the proceedings in respect of File No. 3406-90-U are hereby terminated.
- Our reasons for this decision will issue at a later date, as will Board Member Sloan's dissent.
- 2. The purpose of the present decision is to provide our reasons for that earlier decision.
- 3. In support of its aforementioned application for certification, the Union filed with the Board twelve membership applications. Each application is numbered and provides space for the following information to be filled in on the front of the application:

Official Application for Membership Sudbury Mine, Mill & Smelter Workers Union Local 598

19 Regent St. S., Sudbury, Ont. Date	
Name (Print)	Age
Address	
Employed by	Check
Location	
Organizer(Over)	Amt. Paid

The back of the application reads as follows:

I hereby accept membership in the Local 598, Sudbury Mine, Mill and Smelter Workers Union, and of my own free will hereby authorize the Sudbury Mine, Mill and Smelter Workers Union Local 598 its agents or representatives to act for me as a collective bargaining agency in all matters pertaining

to rates of pay, wages, hours of employment, or other conditions of employment. From this date forward.
Signed Seniority Date
Badge No.
Date19

4. Each of the Union's membership cards initially had as its lower front portion a temporary receipt in the following form:

Sudbury Mine, Mill & Smelter Workers Union Local 598 19 Regent St. S., Sudbury, Ont.

TEMPORARY RECEIPT

Received of	Amt. \$
Date(This Receipt Should Be Excha	Received bynged for Official Receipt When Initiated)

However, as indicated below, those temporary receipts were separated from the upper portion of the cards (by tearing along a perforated line provided for that purpose) and given to the employees at the time the cards were signed. Thus, none of them was filed with the Board (with the exception of a blank temporary receipt attached to a blank membership application that was entered as an exhibit in these proceedings on the agreement of the parties).

5. During the course of the hearing, we drew the parties' attention to the following information which had been gleaned from a further check of the membership evidence:

Although each card has been signed by an employee, indicates \$1.00 in the "Amt. Paid" space, and contains a printed name beside the word "Organizer", none of the cards bears the signature of the organizer or collector. The first card has been signed by an employee and has a printed name beside the word "Organizer". The name of the employee who signed that first card (as an applicant for membership) appears in printed form beside the word "Organizer" on each of the other eleven cards (except one on which the first name has been written and the second name printed). It appears that the printing in of the organizer's name was not done by the same person on all of those eleven cards. Although the organizer may have printed his name on some of the cards, someone else (possibly the employee applying for membership) appears to have printed in the organizer's name on at least two cards.

6. Rolly Gauthier represented the Union at the hearing of these matters and also signed as the declarant on both of its (Form 9) Declarations Concerning Membership Documents (the first covering ten cards and the second covering two cards). When he sought to adduce oral evidence regarding the aforementioned printed names, respondents' counsel opposed his request. After hearing and recessing to consider the parties' submissions concerning that matter, the Board made the following oral ruling:

Having duly considered the submissions of the parties, we are unanimously of the view that the applicant is entitled to adduce the oral evidence which Mr. Gauthier seeks to call through Mr. Briggs and Mr. Geauvreau. The cards which the applicant has filed with the Board in support of the application each bear the signature of the individual who is applying for and accepting membership in the Union, and each show on their face that an amount of \$1.00 has been paid. However, as previously indicated to the parties, the cards contain only printed names beside the word "Organizer". As indicated in *Leon's Furniture Limited*, [1975] OLRB Rep. Oct. 25, and

Maple Leaf Mills Limited, [1984] OLRB Rep. Oct. 1474, the absence of a collector's signature is not a substantive defect in the documentary membership evidence, but rather is a formal or technical defect. The same is true of the lack of countersignatures by the employees. It is also clear from Maple Leaf Mills that oral evidence can be received in respect of such defects, since such evidence merely goes to "identify and substantiate" the documentary membership evidence: see section 73(2) the Board's Rules of Procedure. As the Board noted in Maple Leaf Mills at the end of paragraph 9, "although the Board cannot entertain viva voce evidence that the payment was made in order to establish that it was, it can entertain that evidence in order to identify the person to whom the payment was made.... In view of the element of confusion that is evident in some of the submissions that we have heard this morning, we note for the guidance of the parties that the aforementioned formal or technical defects (i.e., the printed names of the organizers, and the lack of employee counter-signatures) do not, in and of themselves, give rise to any issue with respect to the validity of the Form 9's that have been filed, since the statements contained in those Forms 9's are consistent with the membership evidence that has been filed. In this regard, we note that the wording of Form 9 refers not to the persons who signed as collectors or organizers, but to "the persons whose names appear on the receipts or other acknowledgments of payment". Whether the oral evidence that Mr. Gauthier seeks to adduce through Messrs. Briggs and Geauvreau will give rise to a Form 9 issue cannot, of course, be determined until that evidence has been heard.

- 7. The oral evidence adduced pursuant to that ruling was given by Richard Briggs and Alex Geauvreau. Mr. Briggs, who has been the President of the Union since 1984, met with Mr. Geauvreau on February 14, 1991, to discuss unionization of the Midas employees. After Mr. Geauvreau indicated that he was interested in joining the Union, Mr. Briggs printed on the front of Union card No. 5330 Mr. Geauvreau's name and address, the name and address of Mr. Geauvreau's employer, and the department in which he worked. Mr. Briggs printed his own name in the "Organizer" space and printed "1.00" in the "Amt. Paid" space. After watching Mr. Geauvreau sign the back of the card and receiving a dollar from him, Mr. Briggs filled in and signed the temporary receipt that was initially attached to the card, tore off that temporary receipt, and gave it to Mr. Geauvreau.
- 8. Mr. Briggs described the use that is made of temporary receipts as follows:

After you sign up an employee and he's paid you the dollar, you sign the receipt and the amount and give it to him. After his membership is approved, he returns the receipt to the Union for an official membership card. It's for accounting purposes, because the cards have numbers on them so you can keep track of them.

In explaining why he printed his name on the upper portion of the card (in the blank beside "Organizer"), Mr. Briggs told the Board:

I do that as a matter of being clear so it's recognizable. My signature is not that legible. I've run into a number of other times that signatures are not that legible....

9. After giving Mr. Geauvreau the temporary receipt, Mr. Briggs used it, and the card which Mr. Geauvreau had just signed, as an example in explaining how Mr. Geauvreau was to sign up his fellow employees who wished to join the Union. Mr. Geauvreau subsequently used the blank cards provided to him by Mr. Briggs to sign up eleven employees. As indicated above, each of those cards has been signed by an employee and indicates payment of a dollar. Mr. Geauvreau printed his name in the space beside "Organizer" on eight of those cards (including one on which he printed his last name but wrote his first name). On the other three cards his name was printed in that space by the employee applying for membership. (When one of those employees misspelled his name, Mr. Geauvreau corrected it by adding the missing letter.) In accordance with the instructions that he received from Mr. Briggs, after watching each employee sign his or her name on the back of the card and receiving a dollar from him or her, Mr. Briggs filled in the temporary receipt, signed it, and gave it to the employee.

- 10. In considering the effect of the absence of a collector's signature on membership cards, the Board wrote, in part, as follows in *Leons Furniture Limited*, [1977] OLRB Rep. Jan. 25:
 - 4. At the outset of the case the Board drew the parties' attention to a possible defect in the membership evidence submitted by the applicant. The evidence was in the form of applications for membership combined with written confirmations acknowledging the payment of the initiation fees. The Board was informed that before a card is executed an additional receipt is attached to combined confirmation. When the initiation fee is paid, the additional receipt is detached along its perforated line and given the payer while the rest of the card is filed with the Board
 - 5. In the facts at hand the employees' signatures appeared both on the application for membership portion of the cards and along the line above a heading (Member's Signature) on the receipt or acknowledgement of payment portion of the cards. As well, the amount of the initiation fee was inserted on the latter portion of the card. Then on a line following the words "\$1.00 Initiation Fee received by" a line which is obviously allocated to the payee or collector's name a person's name was printed and because of variations in the printing it was clear that the collector for at least seven of the cards had not signed or printed his own name on the receipt portion of the card. In other words, the actual collectors' names appeared on all the cards but not in the form of their personal signatures. Accordingly, the Board requested argument on whether the applicant had met minimal evidentiary requirements for membership evidence.

. . . .

- 8. Section 1(1)(j) [now section 1(1)(l)] of the Act defines member as including a person who (i) has applied for membership in the trade union, and (ii) has paid to the trade union on his own behalf an amount of at least \$1.00 in respect of initiation fees or monthly dues of the trade union. Section 92(2)(j) [now section 103(2)(j)] specifically gives the Board the power "to determine the form in which and the time as of which evidence of membership in a trade union... shall be presented to the Board on an application for certification...and to refuse to accept any evidence of membership...that is not presented in the form and as of the time so determined". We note that section 92 does [not] stipulate that this power is to be exercised by way of the Board's rules-making authority under section 91(12) [now section 102(13)] - an authority subject to the approval of the Lieutenant Governor. Accordingly, we are satisfied that while our rules of procedure and forms may speak to the matters referred to in section 92(2)(g), section 92(2)(j) is an independent power that can be exercised by way of adjudication. Thus in fully appreciating the required form of membership evidence one must make reference to the Board's Rules of Procedure and to its jurisprudence - a jurisprudence based upon the power conferred upon the Board by section 92(2)(j) that renders the decision of the Ontario Court of Appeal in Re Hopedale Developments Ltd. and Town of Oakville (supra) inapplicable. In that case the Ontario Municipal Board, without the benefit of a section like section 92(2)(j), fettered its statutory obligation with restrictive principles declared in earlier and unrelated litigation before it.
- 9. Having said this we ought to review the Board's membership evidence requirements by first examining Rule 48(1) [now Rule 73(1)] of the Rules of Procedure. It reads:
 - 48.-(1) Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,
 - (a) is accompanied by,
 - (i) the return mailing address of the person who files the evidence, objection or signification, and
 - (ii) the name of the employer; and
 - (b) is filed not later than the terminal date for the application.

The section is mandatory in nature and requires the signature of the employee to be on the evidence of membership. It makes no reference to any other signature.

10. Paragraph 3 of Form 8 [now Form 9] reads:

3. (Where the documentary evidence consists in part of receipts or other acknowledgments of the payment on account of dues or initiation fees) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgments of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgment of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgment of payment as collector, EXCEPT IN THE FOLLOW-ING INSTANCES:

The wording of this paragraph is open to a number of possible interpretations. First, although the wording makes it clear that the collector's name must appear on "the receipts or other acknowledgments of payment on account of...initiation fees", there is no specific indication that it must appear in the form of a signature. Thus if this approach is adopted the applicant's membership evidence complies with at least Form 8. A second possibility arises from the juxtaposition of the word "receipts" with the phrase "other acknowledgments of payment on account of...initiation fees". In this respect, and having regard to the maximum "noscitum a socus", it can be argued that if the term receipt implies a signature of the payee the subsequent phrase can only have an independent yet related meaning if it applies to something like that which the Board is confronted with in this case. Were it otherwise the phrase beginning "other acknowledgment..." would be superfluous. A third and, for the purposes of this decision, final possibility arises out of the commercial notion that for a receipt or other acknowledgment to be useful to a payor, the payee must sign or in some other way personalize the evidence documenting the transaction. With this meaning ascribed to a receipt or other acknowledgement Form 8 would then envisage the appearance of the collector's name in the form of a signature. And the membership evidence before us fails in this regard. But with this ambiguity in meaning, Form 8 cannot be an exclusive source for ascertaining the Board's policies and the Board's decisions must therefore be carefully reviewed.

11. Until the regulations to the legislation were extensively amended by O.R. 268/60, paragraph 7a of Form 2 (a form entitled *Application for certification*) read:

7a. The applicant submits with this application documentary evidence of compliance by employees of the respondent with the standard of the Board respecting membership in the applicant for the purposes of certification, as follows:

- (a) individual applications for membership signed by the employee of the respondent, and
- (b)

 (i) individual receipts or duplicate receipts for payment of at least \$1 by employees of the respondent on account of the prescribed initiation fee or monthly dues of the applicant, signed by the payee or countersigned by the payer, or
 - (ii) evidence that employees of the respondent have presented themselves for initiation, have taken the members' obligation or have done some other act consistent with membership in the applicant as follows:

The paragraph is an important one in that the Board's early cases used it as the starting point for outlining the Board's requirements. But it too, by itself, is an ambiguous statement. One interpretation of this requirement is that the collector was to sign and the payer's signature was optional. This version is arrived at by focusing on the use of the words "countersign by the payer". If countersign means the placing of another signature on a document already bearing a

signature the conjunction "or" could represent an intent that the second signature is optional but the first signature is mandatory. Thus this version would mean that Form 2 provided that the collector's (payee's) signature was a minimum requirement. However, by using the words, phrases or clauses representing alternatives - paragraph 7a could be interpreted to mean that the payee's signature or the payer's signature was required - and therefore an ambiguity arises.

12. But regardless of which interpretation is preferred, the Board has informed the parties that it wants both signatures on all receipts for initiation fees or monthly dues. And this request was expressed in *The City of Windsor* (1953), 53 CLLC 17,050, in the following way:

Although not mandatory, the Board has, for some months now, requested that all receipts for initiation fees or monthly dues by [sic] both signed by the payer and countersigned by the payee, on the assumption that this extra precaution provides more adequate protection for the Board and for the applicant relying on documentary evidence. [emphasis added].

And the reason for this request is important. Membership evidence is not shown to a respondent and is heavily relied upon by the Board in determining that the requirement of section 1(1)(j) have been met and, in that way, ascertaining whether the employees wish to be represented by an applicant trade union. For this reason the Board wants the best documentation of the necessary requirements possible. And two signatures on a receipt - one attesting to the payment of the initiation fee and the other attesting to its receipt - is thought to provide the greatest insurance.

13. But it is also important to note that *The City of Windsor* case prefaced its request with the words "although not mandatory". In other words, the presence of both signatures is preferable but it is not the exclusive form by which the Board will be satisfied of the dollar payment. For example in *Kennametal Tools & Manufacturing Co. Limited* [1963] OLRB M.R. Nov. 422 the receipts submitted by the trade union indicated the payment of one dollar and contained the signature of the collector. However, it was determined that while the written name of the individual member appeared on the receipt above the words "new member's signature" the signatures did not correspond with the specimen signatures filed by the respondent and were in fact inserted by the collector. Having regard to these facts the Board refused to certify the applicant without a confirmatory representation vote and in so doing wrote:

In support of its application for certification, the applicant submitted as evidence of membership twenty membership applications together with twenty corresponding receipts. The respondent filed specimen signatures for a list of twenty-three employees who it states were in the bargaining unit sought by the applicant on the date of the making of the application. A comparison of the union's evidence of membership with the respondent's list reveals that the twenty membership applications are for persons in the bargaining unit on the date of the making of the application. The membership applications bear the signatures of the persons applying for membership. The receipts which indicate the payment of one dollar in each case bear the signature of the collector and ostensibly are countersigned by the new members. Since the signatures on the receipt appearing above the words "new members signature" did not correspond with the specimen signatures filed by the respondent, the Board at the hearing of this application on September 25th inquired into the discrepancy.

The Board was informed by the representative of the applicant that the names appearing above the words "new member's signature" were in fact signed by the collectors. Having regard to the fact that none of the receipts submitted by the applicant indicating the payment of one dollar are countersigned and the non-disclosure of the applicant with respect to countersignatures, the Board finds that the evidence of membership is sufficiently weakened so as to disentitle the applicant to certification without a representation vote.

14. A similar result, more clearly reflecting the continuation and meaning of *The City of Windsor* policy, is reflected in *B. Moscone Tile Co. Ltd.* [1970] OLRB M.R. Apr. 44 where the applicant had submitted combination application for membership and receipt cards. The signature of the individual employee appeared on the application but the receipts, bearing the signa-

ture of the collector and indicating the payment of \$1.00, had not been signed by the employee although the name of the employee appeared. In ordering a representation vote the Board wrote:

...It is the Board's practice to require that all receipts for initiation fees or monthly dues be both signed by the payer and countersigned by the payee, on the assumption that this extra precaution provides more adequate protection for the Board and for the applicant relying on documentary evidence of membership. (see *Sterling Tile Company* case, Board File No. 17112-69-R). Having regard to the fact that none of the receipts submitted by the applicant indicating the payment of \$1.00 are countersigned, the Board finds that the evidence of membership is sufficiently weakened as to disentitle the applicant to certification without a representation vote.

- 15. However, the fact that a representation vote will not always be necessary where the Board's preference for two signatures on the receipt or other acknowledgment remains unsatisfied is demonstrated in *Mercury Terrazzo Limited* [1970] OLRB M.R. June 291 where the receipt, bearing the collector's signature, was on the reverse side of the application card and the individual employee had only signed the application although his name was printed on the receipt. In issuing a certificate without a representation vote the Board emphasized that the applicant had made it unequivocably clear that the receipts were not "countersigned" and thus the Board was in no way misled as in *Kennametal*. The Board also noted that Form 54, Declaration Concerning Membership Documents, Construction Industry, had been filed by the president of the applicant which, based on his personal knowledge, confirmed the accuracy of the membership documents. Finally, paragraph 9 of that decision indicates the panel's understanding of the general approach to be taken with regard to the absence of an individual member's signature on the receipt. It reads:
 - 9. The Board, of necessity, has to rely heavily on the documentary evidence of membership submitted in support of an application for certification. For that reason, although the Board has not made it absolutely mandatory, it is highly desirable, and the Board requests, that receipts submitted indicating the payment of initiation fees be signed not only by the collectors but also countersigned by the applicants for membership. This precaution provides more adequate protection for both the Board and the applicant trade union which is relying on the documentary evidence. Where there is any doubt on the part of the Board as to the propriety of the procedures followed by an applicant trade union in the securing of the evidence of membership union which it relies, the absence of countersignatures on the receipts of initiation fees must weigh heavily against the applicant.
- 16. After reviewing these cases we believe it is fair to say that the absence of an employee's signature on a receipt will not always be fatal in and of itself. Whether the evidence will be accepted at all or only with the confirmation of a representation vote must depend on the nature of the evidence and the particular circumstances surrounding each case. And it can be further said that if a trade union wants certainty in the way its application will be treated by the Board and thus avoid the risks reflected in the preceding decisions the payment of a dollar should be documented by the signature of the collector and the countersignature of the individual member paying the money.
- 17. Unfortunately none of these cases deal with the significance of the collector's signature on a receipt although a close reading of the cases suggest that its presence is assumed. And presumably relying upon this assumption, counsel to the respondent agreed that the pragmatic approach reflected in *Mercury Terrazzo* is one confined to the additional signature of an individual member the countersignature and is not applicable to the collector's signature. However no prior decisions have specifically considered and adopted this proposition at least with respect to the particular kind of membership evidence before us. In fact in *International Nickel Company of Canada Limited* case [1966] OLRB M.R. Jan. 698 the Board said that it was "not concerned with the fact that the collector's name may have been printed on the receipt [because the] identity of the collector is the important thing". And we would observe that the Board has no way of verifying the signatures of collectors in that specimen signatures are not filed for these persons.

Another decision considering a somewhat similar problem is Williams Machines Ltd. [1972]

OLRB M.R. 879. In that case the Board was concerned with certificates of membership that had been signed by the employee but no official of the applicant had countersigned the documents and no signature of the collector of the initiation fee appeared on any of the documents. In dismissing the application the Board wrote:

- 6. The membership evidence filed by the applicant in this case does not consist of application for membership cards but is merely a certificate signed by the person purporting to be a member wherein the person states that he is a member and has paid an initiation fee and further agrees to pay monthly dues. There is nothing from the applicant which verifies the statement made by the employee and the certificate is not a certificate by one of the applicant's officers. Again, while the person purporting to be a member claims that he has paid \$1.00, there is no receipt from the applicant [acknowledging] such payment nor is the collector of such payment identified.
- 7. Finally, since the name of the collector does not appear on the [face] of the documentary evidence filed by the applicant, the statement contained in Item 3 of Form 8 submitted by the applicant, if not meaningless, is patently untrue.
- 8. In view of the facts set out above and the requirements of The Labour Relations Act we find that the documentary evidence of membership submitted by the applicant is entirely unsatisfactory and we are accordingly unable to accept such evidence as proof of membership in the applicant.
- 9. Accordingly, it appears to the Board on an examination of the records that the applicant and the records of the respondent that less than thirty-five per cent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.
- 10. The application of the applicant is therefore dismissed.

Thus although the signatures of the collectors were not present, the Board emphasized the entire absence of a receipt and the failure to "identify" the collector. It also considered these defects in the light of the declaration in Form 8 which could not therefore have been true.

18. On the other hand, although the *Williams Machine* case did not stress the point, the Board has required that certificates of membership - in contrast to combination application for membership and receipt cards - must be signed by the employee and must also be certified correct by an officer of the trade union who is in a position to do so. This requirement is emphasized in *A. Lovisa Masonry Contractor* [1970] OLRB M.R. July 510 where the Board wrote:

...Certificates of membership are frequently used by some trade unions in applications to the Board in lieu of dues books signed by the members which are regarded by the Board as the best proof of membership in a trade union. The surrender of dues books by members, however, frequently causes hardship and inconvenience to the member and his trade union. It is for this reason that the Board has accepted certificates of membership instead of dues books. However, the Board has required that these certificates of membership contain statements by the employee for the trade union and the month and year for which his dues are paid. These statements must be signed by the employee and must also be certified correct by an officer of the trade union who is in a position to do so. Reference is made to the *Frank Licari & Sons* case, OLRB M.R. April 1967, p. 57.

The documentary evidence of membership submitted by the applicant has not been certified correct by an officer of the applicant and therefore does not meet the Board's requirements respecting certificates of membership. The Board, accordingly, finds that the applicant has failed to establish that it had any members at the time the application was made in any bargaining unit the Board might find appropriate for this application.

19. But, certificates of membership aside, it can be said the Board has not had occasion to specifically state that the collector's signature must always be on a receipt or other acknowledgment

of payment. Although we believe that most parties coming before the Board have assumed that the collector's signature is necessary, a specific policy statement like that of the *Lovisa* case or that of the *Mercury Terrazzo* case has not been made. Accordingly, a choice between the two approaches confronts us in this case. The *Lovisa* rule provides certainty and predictability. The *Mercury Terrazzo* policy is a more pragmatic approach centered on the Board's obligation to satisfy itself that \$1 has been paid. *Mercury Terrazzo* and the preceding cases were dealing with the absence of a signature that can be characterized as a form of insurance policy for both the Board and the parties. And pragmatism, even at the expense of administrative certainty, would appear to be a sound and fair policy when considering the absence of a safeguard. On the other hand the *Lovisa* approach would appear to have been adopted in the construction industry because the best evidence - the dues books - is not available to the Board without hardship and inconvenience to both the member and the trade union. A substitute was therefore fashioned.

20. In the facts at hand, we believe the *Mercury Terrazzo* is the most appropriate. The receipts are attached to the membership applications; the applications are signed; the receipts indicate \$1.00 has been paid; the receipts are signed by the employees; and the collector's name appears in a space that does not purport to be allocated to a signature in contrast to the space allocated for the employee's name. Moreover, a Form 8 declaration has been filed by the president of the applicant to the effect that the persons whose names appear on the receipts actually collected the amount shown thereon. While the absence of the collector's signature may "weigh heavily" against the applicant after all the surrounding evidence of this case is heard, we are not prepared to dismiss the application on this factor alone.

11. Reference may also usefully be made to the following passages from *Maple Leaf Mills Limited*, [1984] OLRB Rep. Oct. 1474:

- 2. The difficulty with the membership evidence originally submitted with the application is noted in the following extracts from the Board's decision of July $16,\,1984$:
 - 1.... The application was filed by registered mail on June 22, 1984. It was accompanied by what purported to be documentary evidence of membership of 28 persons claimed to be employees of the respondent. The membership evidence was accompanied by a Form 9 Declaration of David F. Pretty, a National Representative of the applicant. Paragraph three of that document reads as follows:
 - 3. (Where the documentary evidence consists in part of receipts or other acknowledgments of the payment on account of dues or initiation fees.) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgments of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgment of payment is submitted has personally paid in money the amount shown thereon [on] his own behalf to the person whose name appears on his receipt or acknowledgment of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:

[emphasis added]

No exceptions are noted on the form. The membership evidence consisted of combination applications for membership and receipts which were, on their face, regular in all aspects but one: none of the receipts have been countersigned by the collector of the card, and the name of the collector of the \$5.00 payment referred to therein is nowhere shown on any of the cards.

6. In Leons Furniture Limited, [1977] OLRB Rep. Jan. 25, the membership evidence in question was similar in form to the documentation before us: there was no collector's signature. In

. . . .

that case, however, the name of the collector had been printed in the space where the collector's signature would ordinarily be found. The Board reviewed its earlier jurisprudence. It was unable to find a case which addressed the absence of a collector's signature on a combination application and receipt or acknowledgment of payment. While it was clear from the jurisprudence that the Board preferred to see a collector's signature on membership evidence in that form, there was no clear policy statement (as there had been with respect to certificates of membership) that a receipt or other acknowledgment of payment must be signed on behalf of the trade union. In its analysis, the Board treated the collector's signature as an evidentiary safeguard rather than as an essential or constituent element of proof of membership. It took the view that a proper response to the absence of such a safeguard did not require that an application be dismissed, although the defect might well "weigh heavily" against the applicant when all the surrounding circumstances were examined. It is important to note, in considering the decision in Leons Furniture Limited, that the Form 9 (then Form 8) Declaration which accompanied the membership evidence under consideration in that case was not made meaningless by the substitution of a printed name for a signature, because a collector's name did still appear on each card.

7. In Williams Machines Limited, [1972] OLRB Rep. Oct. 879, the applicant had filed certificates of membership by which the signatory certified that he was a member of the applicant and had paid the \$1.00 initiation fee. No official of the applicant trade union had countersigned these documents, nor did the signature of the collector of the initiation fee appear on any of them. The Board made reference to the language of what now appears as paragraph 3 in Form 9, and to the statutory definition of trade union membership which now appears in clause 1(1)(1) of the Labour Relations Act. The Board noted that the documentation submitted did not fit the statutory definition and that "since the name of the collector does not appear on the face of the documentary evidence filed by the applicant, the statement contained in Item 3 of Form 8 submitted by the applicant, if not meaningless, is patently untrue." The Board went on to find that the membership evidence submitted by the applicant was entirely unsatisfactory and would not be accepted as proof of membership in the applicant. The result and analysis in Williams Machines Limited was distinguished in Leons Furniture Limited on two bases. One was that, on the facts in the Leons case, the Form 9 declaration was not made meaningless. The other was that Williams dealt with certificates of membership, with respect to which there were clear Board policy statements requiring official counter signatures, while Leons dealt [with] combination membership application and receipt cards, in respect of which there had been no such policy statements. Focusing just on the effect of absence of the collector's signature, and setting aside for the moment the effect this has on the Form 9 Declaration, we are satisfied that the approach adopted by the Board in Leons Furniture Limited is equally applicable here, even though the names of the collectors have not been printed on the cards before us. The absence of the collector's signature is an irregularity which may affect the weight to be given to the documentary evidence, but does not by itself require rejection of the evidence out of hand.

. . . .

- 9. Section 73 of the Board's Rules of Procedure addresses the subject of evidence of membership in the trade union. Subsection 1 of that section requires, *inter alia*, such evidence be in writing and signed by the employee. Subsection 2 provides:
 - (2) No oral evidence of membership in a trade union ... shall be accepted by the Board except to identify and substantiate the written evidence referred to in subsection (1).

The extent to which oral evidence can be introduced to "identify and substantiate" written evidence of membership has been the subject of a number of Board decisions, many of which are reviewed in *PRC Chemical Corporation of Canada Ltd.*, [1980] OLRB Rep. May. 749. In that case the Board observed that a distinction had been drawn between defects in documentary membership evidence which are "substantive" and those which are "merely formal or technical". In the case of proof of membership within the statutory definition, the fact of application for membership and payment of at least \$1.00 are each substantive matters, and the failure of documentary evidence to address either element would be a substantive defect. The absence of other information, such as the date of the application for membership, is said to be a "formal or technical defect" because it does not go to the substantive elements of proof of membership.

The Board's decision in *PRC Chemical Corporation of Canada Ltd.*, (at paragraphs 23 and 26) puts the absence of a collector's signature in the latter category. Although those statements were *obiter dicta*, we accept them as correct. It follows that although the Board cannot entertain *viva voce* evidence that the payment was made in order to establish that it was, it can entertain that evidence in order to identify the person to whom the payment was made, just as it can entertain such evidence in order to establish the date on which the payment was made.

- 10. The cards filed with this application are, with respect to each employee signatory, written evidence that he or she meets the statutory definition of "member" set out in section 1(1)l) of the *Labour Relations Act*. The oral evidence tendered by the applicant satisfies us that the procedures and inquiries required by Form 9 were carried out. There is no suggestion of any impropriety in the solicitation of membership in the applicant, nor the slightest hint of any defect in any of the applicant's membership evidence other than the one with which we have been concerned to this point.
- 11. ... The issue with which we have been faced, however, was ... whether the applicant's membership evidence was satisfactory. After hearing the evidence and the submissions of counsel, we determined that the evidence was satisfactory....
- As in Leons Furniture, in the instant case the name of the person who actually collected the dollar appears on each of the cards, but not in the form of his personal signature. As indicated above, it has been printed in the space beside the word "Organizer" immediately to the left of the space in which \$1.00 has been filled in beside the words "Amt. Paid". Although we were initially troubled by this departure from the form in which membership evidence is normally submitted to the Board, having duly considered all of the evidence, the submissions of the parties, and the Board's prior decisions regarding such matters, we are satisfied that each of the twelve cards submitted by the Union is valid evidence of "membership" in the Union, within the meaning of section 1(1)(1) of the Act, and that, in the circumstances of this case, directing that a representation vote be taken is not warranted on the basis of the form of the membership evidence. As indicated above, each card is signed by the employee applying for membership and indicates that the employee has paid the amount of \$1.00. Any possible doubt concerning whether the persons whose names appear on the cards in the "Organizer" space were the persons who actually collected the dollars from those employees has been eliminated by the candid and credible testimony of Messrs. Briggs and Geauvreau. (In view of our conclusion in that regard, it is unnecessary for us to determine whether or not the cards would have been acceptable as valid membership evidence in the absence of that testimony.)
- As indicated in the oral ruling quoted in paragraph 6 of this decision, the Form 9 Declarations filed in respect of the membership evidence have not been rendered meaningless by the aforementioned use of printed names, as the name of the individual who collected the dollar appeared on each card (see *Maple Leaf Mills Limited*, *supra*, at paragraph 6). Moreover, we are satisfied on the totality of the evidence that the Form 9 declarant made proper inquiries and was not required, in the circumstances of this case, to list any exceptions in paragraph 3 of Form 9. (See, generally, 599207 Ontario Inc., [1990] OLRB Rep. Dec. 1205; *Cuddy Food Products*, [1989] OLRB Rep. June 583; *Estonian Relief Committee in Canada*, [1989] OLRB Rep. May 440; *Pebra Peterborough Inc.*, [1988] OLRB Rep. Jan. 76; *Westinghouse Canada Inc.*, [1986] OLRB Rep. Feb. 295; *Guelph Paper Box Company Limited*, [1985] OLRB Rep. May 673; and *Bond Place Hotel*, [1983] OLRB Rep. Feb. 202.)
- 14. It was common ground among the parties that fifteen of the seventeen persons whose names appeared on the list filed by the Employer were properly included on that list for purposes of the count. However, there was a dispute regarding the status of Nick Marsales and Dennis Boucher. The Union challenged their inclusion on the list on the grounds that they exercised managerial functions within the meaning of section 1(3)(b) of the Act and, therefore, were not employ-

ees. However, regardless of whether they were included or excluded, more than fifty-five per cent of the employees in the bargaining unit, at the time the application was made, were members of the applicant on March 11, 1991, the terminal date fixed for this application and the date which the Board determined, under section 103(2)(j) of the Act, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

- That level of membership support would generally place the Union in a position to obtain a certificate without a representation vote. However, the objectors filed with the Board five statements of desire (also referred to in this decision as the "petitions") containing a total of ten signatures, including the signature of seven persons who had earlier signed membership cards. Those statements of desire were sent to the Board on March 11, 1991, which (as noted above) is the terminal date fixed for this application. (A further statement of desire was sent to the Board in April of 1991, but that document was not taken into account in deciding this matter as it was not filed with the Board by the terminal date: see section 73(1) of the Board's Rules of Procedure). The petitions were of potential relevance to the exercise of the Board's discretion under section 7(2) of the Act because if they had been found to be voluntary, they would have raised sufficient doubt concerning the continued support for certification by the Union by enough employees who also signed membership cards that the Board would have exercised its discretion under section 7(2) to direct that a representation vote be taken despite the fact that more than fifty-five per cent of the employees in the bargaining unit were members of the Union at the relevant time.
- During the six days on which the Board heard evidence and argument regarding the petitions and the Union's complaint under section 89 of the Act, seven persons were called as witnesses. In addition to their testimony and the documentary evidence described above, the Board had before it two other exhibits which were entered during the course of these proceedings. In making the findings and reaching the conclusions set forth in this decision and in our decision dated August 19, 1991, we carefully considered all of that oral and documentary evidence, the submissions of the parties' representatives, and such factors as the firmness of the witnesses' respective memories, their ability to resist the influence of self-interest to modify their recollections, the consistency of their evidence, and their demeanour. We also assessed what was most probable in the circumstances of the case, and considered what inferences could reasonably be drawn from the totality of the evidence.
- The petitions were prepared and circulated by Nick Marsales, who commenced employment with Midas in 1984 as an installer and subsequently became an apprentice and then a mechanic. Mr. Marsales is a relatively long-service employee who is well respected by his fellow employees and by management. He was offered a position as a foreman in the Spring of 1990 but turned it down. Mr. Marsales was accompanied by Dennis Boucher when he obtained some of the signatures on the petition.
- The petitions were circulated on Saturday March 9, and Sunday March 10, 1991. Earlier that week Messrs. Marsales and Boucher attended a course entitled "Management Excellence". They were accompanied on that course by Scott McDougall, who is one of the Employer's foremen, and by Randy Sychuk, a former Midas employee whom management was planning to rehire as a foreman. Although parts of the course would likely be of benefit to any Midas employee, it is clear from the course's title and from the contents of the course outline (entered as Exhibit 2 in these proceedings) that it was a management training course covering topics that included "managing for excellence objectives", "Midas manager's responsibilities", "characteristics of total quality service managers", "how to build your business", "evaluating performance", and "helping staff accept greater responsibility".

- After taking that course, Messrs. Marsales and Boucher returned to work on Wednesday March 6, 1991, the day on which notices of the Union's application for certification were posted on the Employer's premises. Upon their return, they met with Len Crocco, the Manager of the Employer's shop on Barrydowne Road (the "Barrydowne Shop"). While they were in Mr. Crocco's office, they attempted to discuss the course and to provide him with receipts in order to obtain reimbursement of their expenses. However, Mr. Crocco was so upset about the certification application that he was unable to concentrate upon what they were saying. After telling them that he was upset and that he could not talk to them about anything because his lawyer had told him not to talk to anyone, he sent them back to work.
- 20. A number of Midas employees met at a Sudbury hotel on Thursday evening March 7 to discuss unionization and various complaints which they had regarding their employment. During a conversation which occurred that evening in the hallway outside the meeting room, Mr. Boucher advised Mr. Geauvreau in the presence of two or three other employees that he was not sure about the Union anymore because he had recently been told by Mr. Crocco that he was "in line" for a management position.
- Mr. Crocco had been planning for some time to become a Midas franchisee with a shop 21. in a mall to be built by his father, Henry Crocco, who is the franchisee of the two shops affected by this application. Construction of that shop (referred to in the evidence and in this decision as the "third shop") had been delayed as a result of a belatedly discovered need for a retaining wall at the site, and concomitant financing problems. During the time that the petition was being circulated and signed, there was a widespread rumour that if the Union "came in" (i.e., if the certification application was successful), the third shop would not open and mechanics would be laid off. The evidence does not disclose who started that rumour. However, it is clear from the evidence of Mr. Marsales that several of the employees had the rumour on their minds when they signed the petition. In this regard, Mr. Marsales testified that about five of the petitions' signatories who had previously signed Union cards asked him about the rumour before signing the petition. He also told the Board that he "assumed it [the rumour] was true because everyone was saying it". Mr. Marsales told the Board that he responded to the employees' questions by saying: "I don't know. I can't answer for them. Like it's just a rumour at this point." However, he also testified that when employees asked him if there would be mechanics laid off, he indicated that there could be if management did not open the third shop.
- 22. The basis and effect of petitions was described by the Board as follows in *Brian Chevrolet Oldsmobile Ltd.*, [1989] OLRB Rep. Apr. 324:
 - 9. The system of certification prescribed in Ontario by the *Labour Relations Act* rests primarily upon an assessment of the union's membership support based upon an examination of its documentary evidence of membership. Upon showing the requisite membership support, the union is "certified" or granted a licence to bargain on behalf of a group of employees subject, of course, to their right to file a timely application terminating bargaining rights. The Board does not solicit *viva voce* opinions about trade union representation (see Rule 73(2) which prohibits that), nor, in this jurisdiction, is a representation vote the primary vehicle for achieving the right to represent employees. That right depends upon the solicitation of a sufficient number of membership cards authorizing the union to act as bargaining agent. To protect employees from possible employer reprisals the anonymity of the union supporters is preserved (see section 111 of the Act).
 - 10. This process has been in place for more than thirty years, and doubts about how the Board should go about its task have frequently been resolved by amending the statute (as, for example, to resolve the question of what is a "union member" and the "question" the Board was to ask itself in this regard which prompted section 1(1)(1)). Indeed there is now an elaborate statutory and regulatory framework governing union membership evidence, as the Board has sought to

apply sections 1(1)(l) and 103(2)(j) to the special circumstances of particular cases.... Representation votes are a residual mechanism resorted to where the union cannot demonstrate the support of a "clear majority" (i.e., more than fifty-five per cent) based upon "untainted" membership cards, or where, in the Board's discretion, a representation vote should be held in the particular circumstances of a case. One of those circumstances is a timely and voluntary change of heart by employees who have previously signed union membership cards.

- 11. Neither the Legislature nor the Board has taken a myopic view of the realities of the situation. Employees can and do change their minds. They may voluntarily sign a membership card one day, but later wish to reconsider their support for collective bargaining. In some jurisdictions the statute precludes or inhibits such expressions so that certification is based solely on membership cards. In others such expressions are irrelevant because the preferred method of testing employee wishes is a representation vote. Ontario has evolved a middle position recognizing the validity of union membership cards, but retaining some flexibility to seek the confirmatory evidence of a representation vote where employees have put before the Board a timely "petition" or other document indicating a change of heart. Petitions too have been part of the certification process for decades.
- 12. The Board recognizes that "statements of desire" (see Form 6), usually in the form of a "petition", are not regulated by the Act as directly or precisely as union membership evidence.... Nevertheless, the existence of such statements appears to be contemplated by section 103(2)(j) of the Act and Rule 73 of the Rules of Practice; and in any event, as we have already noted, the Board has a long-established practice of accepting such petitions and exercising its discretion to order a representation vote where:
 - (1) the petition is voluntary (as evidenced by testimony adduced in accordance with Rule 73 of the Rules of Practice), and
 - (2) the petition contains the signatures of a sufficient number of persons who have previously signed membership cards that there is some doubt whether these "members" (in accordance with section 1(1)(1)) continue to support certification.
- 13. The Board must be satisfied, however, that when these union supporters sign the petition indicating an apparent change of heart, they are doing so voluntarily, and are not motivated by a perceived threat to their job security or a concern that their failure to sign would be communicated to their employer, or could result in reprisals. It must be clear that the circulation of the petition is free from the actual or perceived influence of management.
- 23. Reference may also usefully be made to *Morgan Adhesives of Canada Limited*, [1975] OLRB Rep. Nov. 813, in which the Board wrote:
 - 28. There is a natural suspicion which attaches to a statement of desire following closely upon a union organization campaign. The Board must assure itself that the "change of heart" indicated by employees who sign the petition in opposition to the union after having indicated support for that same union, is a free choice unimpeded by overt or subtle pressures....

As noted in *Peacock Lumber Limited*, [1979] OLRB Rep. May 423, at paragraph 8, in view of the sensitive nature of the employment relationship, "the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it." See also *Westlake Electrical Contractors Limited*, [1990] OLRB Rep. Nov. 1163; *Racal-Chubb Canada Inc.*, [1990] OLRB Rep. Sept. 944; *Hully Gully London Ltd.*, [1990] OLRB Rep. Feb. 160; *Blue Bell Canada Incorporated*, [1990] OLRB Rep. Feb. 121; *Lo Food*

Division of Lumsden Brothers Limited, [1983] OLRB Rep. May 676; Schenker of Canada Limited, [1982] OLRB Rep. June 937; Catfish Calhoun Inc., [1981] OLRB Rep. Nov. 1551; Westgate Nursing Home Inc., [1981] OLRB Rep. June 810; Frito-Lay Canada Ltd., [1981] OLRB Rep. May 538; Fibre Therm Corp., [1980] OLRB Rep. Aug. 1196; and Dad's Cookies Ltd., [1976] OLRB Rep. Sept. 545.

- In the instant case Mr. Marsales prepared and circulated the petitions at locations away 24. from the Employer's premises. Although his ability to recall some of the pertinent details was somewhat limited, we found his evidence concerning the origination and circulation of the petition to be candid and forthright. However, in the circumstances of this case, we are not satisfied on the balance of probabilities that the petitions represent a voluntary statement of desire on the part of those who signed them. In reaching this conclusion, we have taken into account all of the material facts, including the following. The petitions were circulated by two employees who had very recently returned from a management training course that they took along with an existing foreman and a foreman to be. Upon returning from that course they met with their Manager, Len Crocco, who was so upset by the certification application that he was unable to concentrate on what they were saying. At least some of the employees became aware that Mr. Boucher, who assisted Mr. Marsales in circulating the petition, had been told by Mr. Crocco that he was "in line" for a management position. Moreover, a number of employees who signed the petition were concerned about the rumour that the third shop would not open if the Union came in and that some mechanics would be laid off. In light of all of the circumstances, including the relatively close relationship which Mr. Marsales and Mr. Boucher had with management, and the extent to which the aforementioned rumour had pervaded the work force, it is probable that many employees signed the petitions because they feared that management would become aware, through Mr. Marsales or Mr. Boucher, of employees who refused to sign, and/or because they feared that if the Union gained bargaining rights the third shop would not open and some mechanics would be laid off.
- 25. Thus, we were (and still are) satisfied on the basis of all of the evidence before us that:
- (1) irrespective of the status of Messrs. Marsales and Boucher, more than fifty-five per cent of the employees of the Employer in the bargaining unit, at the time the application was made, were members of the applicant on March 11, 1991, the terminal date fixed for this application and the date which the Board has determined under section 103(2)(j), to be the time for the purpose of ascertaining membership evidence under section 7(1) of the Act; and
- (2) there are no circumstances present in this case which warrant the exercise of the Board's discretion under section 7(2) of the Act to direct that a representation vote be taken.
- 26. Thus, for the reasons set forth above and in our decision dated August 19, 1991, the applications in File Nos. 3095-90-R and 0029-91-R were granted, and the proceedings in respect of File No. 3406-90-U were terminated.

DECISION OF BOARD MEMBER ROBERT M. SLOAN; October 10, 1991

1. With respect I strongly dissent from the majority decision.

The Membership Evidence

2. It is my view that the acceptance of such obviously flawed and defective membership evidence flies in the face of previous rigid Board standards which require that membership evidence be of a high quality. The relaxed standards accepted by the majority decision will cause con-

fusion in the Labour Relations community, and will reduce the effectiveness of the Board's policy which attempts to maintain an element of consistency in this area.

- 3. In this instant case none of the membership cards were countersigned by the applicant employee; there is no physical evidence that in fact the employees received any acknowledgement in the form of a receipt that they had in fact made the statutorily required \$1.00 payment; there is no acknowledgement in the form of a signature that the one dollar had in fact been paid.
- 4. The Board has reiterated time and time again its insistance upon the submission of quality membership evidence. I will cite only a couple of cases to illustrate this. See *Zehrs Markets Limited*, [1972] OLRB Rep. June 635 at paragraph 4:

...The Board has exacted very stringent standards from applicants who submit membership evidence. These stringent requirements are necessary because the membership evidence or records of trade unions relating to membership fall within the secrecy requirements of section 100 [now section 111] of the Labour Relations Act...the Board approaches its statutory responsibility under section 7 of the Act and accordingly is extremely vigilant in ensuring the propriety of membership evidence. Since the Board in turn must rely on the evidence of membership entered by the applicant trade union the board has exacted strict requirements from applicant trade unions with respect to that membership evidence and particularly with the declaration concerning membership documents (Form 8)(now Form 9)...

[emphasis added]

5. In B. Moscone Tile Co. Ltd., [1970] OLRB Rep. April 44, receipts had not been signed by the employee, the Board, in ordering a representation vote, wrote:

...It is the Board's practice to require that all receipts for initiation fees or monthly dues be both signed by the payer and countersigned by the payee, on the assumption that this extra precaution provides more adequate protection for the Board and for the applicant relying on documentary evidence of membership. (See Sterling Tile Company case, Board File No. 17112-69-R.) Having regard to the fact that none of the receipts submitted by the applicant indicating the payment of \$1.00 are countersigned, the Board finds that the evidence of membership is sufficiently weakened as to disentitle the applicant to certification without a representation vote.

[emphasis added]

6. Again in Wheatley Manufacturing Limited, [1964] OLRB Rep. Dec. 457, the Board wrote:

The Board has certain well established requirements as to evidence of membership submitted in support of applications for certification. These requirements include...that applications for membership be made in writing, signed by the person said to be a member of the applicant; that each person said to be a member of the applicant pay to the applicant, on his own behalf, an amount of at least \$1.00 in respect of the prescribed initiation fee or monthly dues of the applicant; that this money payment be confirmed by a written receipt signed by the person who collected the money and counter-signed by the person who paid the money, and that this evidence be supported by a declaration in Form 9 [now Form 8] = [sic] with respect to the collection of the money. By section 50(1) [now 48(1)] of the Board's Rules of Procedure evidence as to representation must be in writing and by section 50(2) [now 48(2)] of the Rules, the Board is prohibited from accepting oral evidence of membership except to identify and substantiate the written evidence.

[emphasis added]

7. In addition to the obvious membership evidence flaws, there is in my view a problem with the Form 9, which in itself warrants serious consideration by the Board with respect to the dismissal of the application. The Board has made a distinction between the declarant on a Form 9

who is not, or is not expected to be, well versed in the rules of the Board with respect to the preparation of the Form 9, and a declarant who holds a position of some responsibility with respect to the applicant union.

In this case Mr. Gauthier, Executive Staff Representative has long engaged in professional trade union activities and is, or should be, well versed in certification application requirements. The fact that the membership evidence with respect to the three cards that were not in any way prepared by Mr. Geauvreau was not brought to the Board's attention on the Form 9 and this omission alone justifies the application's dismissal.

- 8. As noted in Ontario Labour Relations Board Law and Practice by *Sack and Mitchell*, at page 185, section 3:4210, beginning at line 1:
 - "...membership evidence is generally in the form of membership application cards signed by the employees together with receipts for one dollar signed by the collector and counter-signed by the employees."
 - "A membership without a receipt is not acceptable."
 - "The receipt should be signed by the collector and counter-signed by the employee."

[emphasis added]

9. Again, in *Sack and Mitchell*, at page 178, under section 3.4120 form of membership evidence we read, beginning at line 5:

...it (the Board) has accepted membership evidence in the form of an application for membership in writing (membership application card), signed by the employee, together with a written receipt for payment of one dollar (which may be combined with the card), signed by the person who collected the money and counter-signed by the employee who paid the money.

[emphasis added]

- 10. I fail to understand why the membership evidence is even an issue it is so clearly and incontrovertibly defective, fatally so, in my view.
- 11. For reason(s) known perhaps only to himself Mr. Rolly Gauthier, the Union's Executive Staff Representative, did not put into evidence, or even offer to put into evidence, photocopies of the receipts which he claimed to have in his possession during the hearing. The inference I draw from this is that the production of those receipts, if they in fact exist at all, would have shown further serious irregularities.
- As if the defects referred to in paragraph 3 above are not enough, we have the direct testimony from Mr. Geauvreau that the employee-applicants were instructed by him to fill out the front portion of the card, and we know that in at least three instances the name of the organizer was printed on the membership card by the employee there is absolutely no physical evidence, so vital in this certification matter, that Mr. Geauvreau did in fact participate in the transaction surely this is a serious enough irregularity to require that the Board reject the three cards in question.
- 13. There is "viva-voce" testimony from Mr. Alex Geauvreau that he collected one dollar from each person who signed the back of a membership card but this testimony has to be seriously questioned on the grounds that it is self-serving, but more importantly, as mentioned in the previous paragraph, the applicant did not place into evidence any copies of the receipts of which it claimed to have. The inference to be drawn from this omission, as mentioned earlier, is clearly that

the receipts, if they do in fact exist, are themselves in some way faulty or at the very least fatally incomplete.

- 14. The Board's strict standard and the jurisprudence which has repeatedly emphasized the consequences of failure to comply with that standard are well known in the Labour Relations Community, in this instance the applicant failed to meet those standards and should suffer the consequences.
- 15. It is my respectful submission that on the face of the membership evidence submitted the application for certification should be dismissed outright.
- 16. At the very least, however, in view of the three membership cards which bear absolutely no indication that the "organizer" was in fact involved in the transaction his printed name having been placed upon the card by someone other than Mr. Geauvreau himself a representation vote should be ordered following the rejection of these cards by the Board.
- 17. Of minor consequence in view of the fatal membership evidence but significant nevertheless in assessing the credibility of Mr. Geauvreau's testimony, is the contradiction by Mr. Geauvreau of the evidence given by the Union President, Mr. R.W. Briggs, that he (Mr. Briggs) had given Mr. Geauvreau 15 to 20 blank membership cards while when questioned by counsel for the respondent as to why he did not prepare new cards for the three cards which he agreed had been improperly prepared, Mr. Geauvreau stated that he did not have extra cards presumably the Board is asked to believe that he knew in advance that he would approach and obtain signatures from exactly eleven employees.

The Statement of Desire (The Petition)

- 18. With reference to the petition, I am compelled to ask "Why is it that when the Board deals with allegations of coercion, intimidation and other wrong-doing during union organizing drives, it invariably concludes that the potential bargaining unit members are intelligent and rational people quite capable of separating the wheat from the chaff and deciding for themselves with respect to union membership, but when it comes to petitions the very same people are considered to be intellectually stunted, somehow becoming incapable of making even the simplest of decisions in regard to the prevailing circumstances."
- 19. The very first matter that should be recorded is that there is no evidence whatsoever of any management involvement in the origination, circulation, custody etc., of the petition. Indeed the applicant union makes no allegations in this respect. This is a big hurdle which petitioners generally have to overcome and in this case, in this respect at least, the petition meets, absolutely, the Board's requirements.
- 20. Notwithstanding this finding, the majority, in my view, erroneously rejects the petition on what I consider to be less than convincing grounds.

The Rumour

21. The rumour which had been making the rounds at the time of the circulation of the petition had to do with the possibility that a third shop would not open if the two existing shops became unionized.

The origin of the rumour was never established - importantly it was not laid at management's door-step.

Taken at face value the rumour posed no threat to anyone's job security except - if they took the rumour seriously - to four mechanics who represented less than 25% of the bargaining unit.

It makes no sense whatsoever to believe, as the majority does, that any of the mechanics would be so threatened by the rumour that they and other employees would feel compelled to sign the petition. Regardless of any management decision with respect to the third shop they would still enjoy job security at the existing two locations.

Surely if any of the mechanics believed that they felt threatened by the rumour we would have, or should have, heard evidence in this respect.

- 22. To the contrary we have testimony by Ms. Colleen Brooks, a union witness and supporter, who confirmed that the rumour was not taken seriously by the employees with whom she discussed it because it would have no effect upon them or their jobs.
- 23. Clearly the rumour is of little, if any, significance in the determination of why employees signed the petition.

Training Course

24. The majority decision, in my respectful submission, places extraordinary weight upon the attendance at the training course by Messrs. Marsales and Boucher, a weight that it cannot bear.

We heard testimony from Mr. Len Crocco along the following lines:

- We have a Midas convention every year and my area manager advised me that a course was going on during our slow period;
- There was no fee this time, usually there is a fee for employees attending;
- I didn't decide in time as to whether or not I would send people to the course in question, so I was offered four spots in another course, again at no tuition cost;
- I didn't know the content or outline of the replacement course but I have been on such courses myself and I expected it would include, among other matters; personal appearance; talking directly with customers; and talking on the phone, matters pertinent to the training of shop employees;
- The course is designed strictly for Midas franchisees;
- I told the caller that I would talk to the guys in the shop and if they wanted to go I would let him know;
- I asked Mr. Nick Marsales and Mr. Denis Boucher my two senior experienced shop employees if they wished to attend and they agreed that they would.
- 25. The majority decision would have us believe that attendance at this course by Messrs.

Marsales and Boucher created the perception amongst the other employees that these two employees were in fact managerial.

Not so, said Ms. Debra Brebant-Pinsent, a union witness and supporter, who in conversation with her fellow employees likened the trip to Barrie, where the course was held, as a lark and an opportunity for the guys to get away for awhile, have a good time and enjoy themselves.

The most telling argument against using the course content as proof positive that Messrs. Marsales and Boucher were perceived to be management in the eyes of employees is the uncontradicted testimony of Mr. Len Crocco that he himself did not come into possession of the course outline document, (exhibit #2) in these proceedings, until a day or two before the first day of the hearing, viz, 30 April, 1991.

The employees in the shop could not possibly have been influenced by the contents of the course document at the time of the circulation of the petition because it is clear to me that they were not aware of its existence at the time that they signed the petition, and quite possibly not aware of its existence until the document was put into evidence at the hearing on April 30, 1991.

- 27. As to the status of Messrs. Marsales and Boucher being considered to be "management" we have the following testimony to help us conclude that they were not perceived by any employees to be so.
- When asked by Mr. Marsales whether he considered him (Mr. Marsales) to be his boss Mr. Geauvreau answered unequivocally "No".
- Mr. Gauthier during the course of the hearing withdrew his challenge to Messrs. Marsales and Boucher being on the employer's list and agreed, without argument, to their being included as members of the bargaining unit.
- The principal "evidence" Mr. Gauthier sought to adduce to establish Mr. Marsales management status was a question concerning how well he got along with management.

One would like to think that regardless of one's status, employees "getting along well" in any organization particularly one as close-knit as at Midas, would be essential to an effective, efficient and hopefully profitable operation and would be desirable at all levels in the organization, and it would not be relied upon as proof of "management status".

Summary

- 28. In all of the circumstances of this case relating both to the membership evidence and the statement of desire (petition) the fair and just resolution would have been the ordering, by the Board, of a representation vote.
- 29. While I would agree to the holding of a representation vote to jointly settle the two issues referred to above the membership evidence standing on its own warrants outright dismissal of the application.
- 30. The finding that the petition was not voluntary based upon the perception issue relating to the rumour concerning the third shop; the training course; and the status issue; cannot be supported by the facts in this case.
- 31. It is my considered opinion that the finding made by the majority in interpreting the evidence and testimony with respect to the matters before the Board unfairly denies the petitioners

their lawful right to express their views in a democratically held representation vote, a vote which I would have ordered.

2708-90-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. **Polytech Coatings Limited**, Respondent v. Group of Employees, Objectors

Charges - Evidence - Intimidation and Coercion - Practice and Procedure - Representation Vote - Board earlier deciding to afford all parties opportunity to call evidence regarding certain allegations concerning representation vote - After calling its witnesses, employer seeking Board's consent, under section 72(4) of the Board's Rules of Procedure, to adduce evidence regarding other incidents which allegedly occurred at least seven months earlier - Board not permitting employer to expand already protracted proceedings by belatedly filing additional allegations - Request for consent denied

BEFORE: Robert D. Howe, Vice-Chair, and Board Members D. G. Wozniak and P. V. Grasso.

APPEARANCES: Bertha Greenstein and Hassan Yussuff for the applicant; Andrew J. Roman, Charles R. Robertson, and Alan May for the respondent.

DECISION OF THE BOARD; October 29, 1991

1. On September 13, 1991, the respondent (also referred to in this decision as the "Company") sought the Board's consent, under section 72(4) of the Board's Rules of Procedure, to adduce evidence regarding incidents which allegedly occurred in January and February of 1991. That subsection provides as follows:

No person shall adduce evidence at the hearing of an application or complaint of any material fact that has not been included in the application or complaint or in any document filed under these Rules in respect of the application or complaint, except with the consent of the Board and, if the Board considers it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

2. The January incidents involve threats allegedly made on January 18 and 29, 1991, by an in-plant organizer of the applicant (also referred to in this decision as the "Union") to an employee whose car had been damaged in the Company parking lot. It is alleged that on those two dates the in-plant organizer told the employee that he would not be able to guarantee that this would not happen again if the employee did not vote for the Union. Those threats (referred to in this decision as the "car threats") were reported to the respondent on January 30, 1991, and were raised in a somewhat less specific form by Charles R. Robertson of respondent's counsel in a letter dated February 4, 1991 to the Board's Registrar. (They were also referred to in greater detail in a letter to the Registrar dated February 13, 1991, from David S. Zimmer of counsel for the objectors.) Those allegations were to be heard by the Board (differently constituted) along with evidence regarding a petition, revocations, and various other allegations made by the objectors, the respondent, and the applicant, in respect of this certification application. However, during the afternoon of the first day of hearing (February 15, 1991), the parties agreed that their differences should be resolved by the

taking of a representation vote. That vote was taken on February 28, 1991, and resulted in 55 ballots being marked in favour of the Union and 43 ballots being marked against it.

- 3. The other incident raised by the respondent on September 13, 1991 involves an allegation that sometime in February prior to the vote, an in-plant organizer backed an employee up against a wall and, while holding him there by the throat, told him that if he changed his mind and no longer supported the Union he would be stabbed with a knife. Respondent's counsel was unable to tell the Board when that incident (hereinafter referred to as the "throat incident") came to the attention of his client.
- 4. After the representation vote was taken, the following notice was furnished by the Board's Returning Officer to each of the parties, including the respondent (which also received copies thereof for posting on its premises in conspicuous places where they would most likely come to the attention of all of the employees who might be affected by the application):

FILE NO. 2708-90-R

Form 70

LABOUR RELATIONS ACT

NOTICE OF REPORT OF RETURNING OFFICER

BEFORE THE ONTARIO LABOUR RELATIONS BOARD

Between:

National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)

Applicant

- and -

Polytech Coatings Limited

Respondent

- and -

Group of Employees

Intervener

TO: ALL THE PARTIES ON THE ATTACHED SCHEDULE "A"

- 1. Attached hereto is a copy of my report upon the representation vote herein held on the 28th day of February, 1991, under the direction of the Board dated the 15th day of February, 1991.
- 2. TAKE NOTICE that if you desire to make representations as to any matter relating to the representation vote, or as to the accuracy of the report, or as to the conclusions the Board should reach in view of the report, you shall send to the Board a statement of desire to make representations which shall,
 - be in writing signed by the person making the statement or his representative;
 - (b) contain the names of the parties to the application;

- (c) contain a return mailing address; and
- (d) contain a statement as to whether you desire a hearing before the Board in connection with the report.

If you desire to make representations as to any matter relating to the representation vote, or as to the accuracy of the report, your statement of desire must contain a concise statement of your allegations concerning the representation vote or as to errors in or omissions from the report.

If you wish to make representations as to the conclusions the Board should reach in view of the report, your statement should contain a summary of the representations you wish the Board to consider in connection with the report.

- 3. A statement referred to in paragraph 2 shall be sent to the Board so that,
 - (a) it is received by the Board; or
 - (b) if it is mailed by registered mail addressed to the Board at its office, 400 University Ave., Toronto, Ontario, M7A 1V4, it is mailed;

not later than the 8th day of March 1991.

* IF NO STATEMENT OF DESIRE TO MAKE REPRESENTATIONS IS SENT TO THE BOARD IN ACCORDANCE WITH PARAGRAPHS 2 AND 3, THE BOARD MAY DISPOSE OF THE APPLICATION UPON THE MATERIAL BEFORE IT WITHOUT FURTHER NOTICE TO THE PARTIES OR THE EMPLOYEES.

DATED at Malton, Ontario, this 28th day of February, 1991.

5. That notice reflects the requirements of section 70(1) of the Board's Rules of Procedure, which reads:

Subject to subsection (3), where a representation vote is taken after the hearing of an application.

- (a) a party; or
- (b) any employee or representative of a group of employees,

who desires to make representations as to any matter relating to the representation vote, or as to the accuracy of the report of the returning officer, or as to the conclusions the Board should reach in view of the report, shall file a statement of desire as prescribed in Form 70 or 72, as the case may be, on or before the last day for the posting of the copies of the report and notices under subsection 69(3).

- 6. In accordance with the directions contained in that notice, counsel for the objectors caused to be delivered to the Board on March 8, 1991 a letter (bearing that same date) containing three allegations concerning the representation vote. The hearing of those allegations was scheduled to commence on June 10, 1991. However, after the objectors sought leave to withdraw those allegations and the respondent alleged that the objectors had been intimidated into doing so, the Board proceeded to hear evidence and argument concerning that allegation by the respondent on June 11 and 12, July 29, and August 6, 1991.
- 7. In a decision dated August 16, 1991, the Board wrote as follows:

Having duly considered all of the evidence and the parties' submissions, the majority of this panel of the Board, with Board Member Grasso dissenting, have concluded that, in the circumstances of this case, the interests of justice would be best served by affording each of the parties

an opportunity to call evidence regarding the allegations set forth in David Zimmer's letter dated March 8, 1991. Accordingly, the hearing will proceed on September 6 and 13, 1991, as previously scheduled.

The hearing proceeded as scheduled on those two days, during which the Board heard evidence from three witnesses called by the respondent. At the conclusion of the testimony of the third witness, the respondent raised the matters described in the first three paragraphs of this decision. The respondent's request for the Board's consent to adduce evidence concerning those allegations was vigorously opposed by the applicant. In ruling on that request, the Board wrote as follows in a decision dated September 20, 1991:

For reasons which will issue at a later date, the Board hereby denies the respondent's request for consent (under section 72(4) of the Board's Rules of Procedure) to adduce evidence regarding the incidents described by its counsel on September 13, 1991 in his submissions to the Board.

- 8. The purpose of section 72 of the Board's Rules of Procedure was described as follows in *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138:
 - 20. A party proposing to rely on allegations of intimidation, coercion or other improper conduct is obliged to give notice and full particulars of the allegations at the earliest opportunity. Rule 72 of the Board's Rules of Procedure provides:
 - (1) Where a person intends to allege, at the hearing of an application or complaint, improper or irregular conduct by any person, he shall,
 - (a) include in the application or complaint; or
 - (b) file a notice of intention that shall contain,

a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision.

- (2) Where, in the opinion of the Board, a person has not filed notice of intention promptly upon discovering the alleged improper or irregular conduct, he shall not adduce evidence at the hearing of the application of such facts, except with the consent of the Board and, if the Board deems it advisable to give such consent, it may be so upon such terms and conditions as it considers advisable.
- (3) Where a statement in an application or complaint or in any document filed under these Rules in respect of the application or complaint is so indefinite or incomplete as to hamper any person in the preparation of his case, the Board may, upon the request of the person made promptly upon receipt of the application, complaint or document, direct that the information stated be made specific or complete and, if the person so directed fails to comply with the direction, the Board may strike the statement from the application, complaint or document.
- (4) No person shall adduce evidence at the hearing of an application or complaint of any material fact that has not been included in the application or complaint or in any document filed under these Rules in respect of the application or complaint, except with the consent of the Board and, if the Board considers it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

The purpose of this Rule was explained in *Trigiani Contracting Limited* [1979] OLRB Rep. Feb. 141:

"7. That section [has] a twofold purpose grounded in both legal considerations and in industrial relations considerations. The legal consideration implicit in section 47 [now 72] of the Board's Rules of Procedure is a recognition of the rule of natural justice that anyone charged with wrongdoing should have sufficient notice of the charge against him. The labour relations consideration is a recognition that the realities of union organization are such that a delay of Board proceedings may serve to defeat the union. A union may successfully defend charges made against it only to discover, upon the late granting of a certificate, that its support among the employees has substantially eroded because, for reasons often not fully understood by rank and file employees, it has failed to get certified promptly and commence immediately to bargain on their behalf. For that reason section 47 [now 72] of the Board's Rules of Procedures seeks to strike a balance between natural justice and the avoidance of delay in certification proceedings or any other proceedings before the Board. In an application for certification both the interests of natural justice and industrial relations are best served when allegations of wrongdoing are made in sufficient time and with sufficient particularity that an applicant union is not prejudiced either by surprise or by being forced to seek adjournment and the delay of its own application. Therefore, where allegations against an applicant are not filed in a timely manner or with sufficient particularity the Board may refuse to entertain them. (Fleck Manufacturing Limited 62 CLLC ¶16,236; Cable Tech Wire Company Limited (as yet unreported) Board File No. 0297-78-R, June 21, 1978)."

The need for expedition in labour relations matters is well recognized: Hotel and Restaurant Employees Union v. Nick Masney Hotels Ltd., [1970] 3 O.R. 461 (C.A.); Jordon v. York University Faculty Association (1978) CLLC ¶14,132 (Div. Ct.); Re Flamboro Downs Holdings Ltd. and Teamsters Local 879, (1979) 24 O.R. (2d) 400 (Div. Ct.); and Journal Publishing Company of Canada Ltd. et al v. The Ottawa Newspaper Guild, Local 204 et al, (unreported, Ontario Court of appeal, March 31, 1977) wherein Estey, C.J.O. (as he then was) observed:

In the law which has grown up around labour relations in this province, and indeed elsewhere where the common law is pursued, the overriding principle invariably applied is that labour relations delayed are labour relations defeated and denied.

Rule 72 applies to all parties to the process. In Cable Tech Wire Company Limited, [1978] OLRB Rep. June 496 (judicial review denied November 10, 1978, unreported) the Board refused to entertain allegations known to the employer for two weeks before notice thereof was finally given on the last business day before the Board's hearing. Counsel's excuse that he had until then been unaware that witnesses were available to prove the allegations was not considered sufficient reason for having withheld them. In Gignac, Sutts, Nosanchuk, [1973] OLRB Rep. Aug. 438, the Board refused to entertain union charges advanced in support of certification without a vote when the events alleged were known to the union for as much as a month before notice was given. In Fleck Manufacturing Limited, 62 CLLC ¶16,236, the Board refused to entertain objectors' allegations of impropriety in the union's collection of membership evidence, when the allegations were first raised at the hearing of the union's certification application although known to counsel for the objectors for nine days prior. In Fleck the Board said:

It is incumbent on all parties to proceedings before the Board to investigate matters relevant to their cases as early as possible and if they intend to make allegations of improper or irregular conduct against another party to do so promptly. The object of this requirement, which finds expression in section 48 [now 72] of the rules, is obviously to expedite and facilitate the hearing and processing of applications under the Act and to avoid prejudice, delay or embarrassment to the parties involved. Delayed and last-minute allegations, which lead to adjournments or cause prejudice, embarrassment or unnecessary expense to the other parties, and which with reasonable diligence could have been made at a more timely stage of the proceedings will not be entertained except for good and sufficient cause.

1991, and were the subject of allegations made by both the respondent and the objectors in February of 1991. Evidence concerning those allegations and other matters then in dispute among the parties would have been heard by the Board (differently constituted) commencing on February 15, 1991 but for the agreement of the parties that their differences be resolved by the taking of a representation vote. Having agreed to that vote with full knowledge of the car threats, the respondent cannot legitimately be permitted to resurrect those allegations after the vote has been taken and has yielded a result which is not to its liking.

- Moreover, even if the alleged existence of intimidatory conduct following the Board's direction that a representation vote be taken were to be treated as an extenuating circumstance which permitted the respondent to resile from its decision to forgo litigating the car threats, the respondent would still not be permitted to do so at this belated juncture. As indicated in section 70(1) of the Rules and in the (Form 70) Notice of Report of Returning Officer, a party desiring to make representations as to any matter relating to the representation vote must send to the Board, within the time frame specified in that notice, a statement of desire containing a concise statement of the party's allegations. No legitimate explanation has been offered for the respondent's failure to file its allegations with the Board by March 8, 1991, which was the deadline specified in the above quoted (Form 70) notice. By that date the respondent had been aware of the car threats for five weeks. Although it is unclear when the respondent first learned of the throat incident, there is nothing to suggest that if it had proceeded with due diligence to investigate matters relevant to its case, it could not have become aware of that incident in time to fulfil the requirements of Rule 70(1) and Form 70.
- The Board certainly does not condone conduct of the type described by respondent's counsel in respect of his client's allegations concerning the car threats and the throat incident. However, while the seriousness of the conduct forming the subject matter of the allegations is a factor which may be considered by the Board, it is not the only factor. The well recognized need for expedition in labour relations proceedings in general, and in certification proceedings in particular, is a factor which is at least equally important. In the instant case, the respondent chose to rely upon the allegations filed by the objectors and to file none of its own within the time frame provided for doing so. It was not until more than five months after the deadline specified in the Form 70 notice that the Company sought to raise additional allegations which, if heard, would in all probability extend beyond January of 1992 the hearing of this application, which was filed on January 16, 1991. Having regard to all of the circumstances, we are unanimously of the view that the respondent should not be permitted to expand these already protracted proceedings by belatedly filing additional allegations.
- 12. Thus, for the foregoing reasons, the Board, having duly considered the submissions of counsel in light of all of the material circumstances, denied the respondent's request for consent (under section 72(4) of the Board's Rules of Procedure) to adduce evidence regarding the allegations described above.

2178-90-R; 2754-90-U Local 47 Sheet Metal Workers' International Association, Applicant v. Rayproof Canada Limited, Respondent v. Group of Employees, Objectors; Local Union 47 Sheet Metal Workers' International Association, Complainant v. Rayproof Canada Limited, Respondent

Certification - Construction Industry - Petition - Unfair Labour Practice - When petition activity examined in context of totality of events, Board not satisfied that petition representing voluntary expression of employee wishes - Certificate issuing - Union alleging lay-off of union supporters in violation of the Act - Board finding employer's contention credible that only reason grievor not offered additional work was because of employer's understanding that they did not want such work - Complaint dismissed

BEFORE: Ken Petryshen, Vice-Chair, and Board Members J. Lear and N. A. Wilson.

DECISION OF THE BOARD; October 11, 1991

- 1. The Board has two matters before it. Board File No. 2178-90-R is an application for certification filed by Local 47 Sheet Metal Workers' International Association ("Local 47"). Board File No. 2754-90-U is a section 89 complaint in which Local 47 alleges that Rayproof Canada Limited ("Rayproof") contravened sections 64, 66 and 70 of the *Labour Relations Act*. Having regard to the agreement of the parties, these two matters are consolidated.
- 2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the Labour Relations Act and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 28, 1986, the designated employee bargaining agency is the Sheet Metal Workers' International Association and the Ontario Sheet Metal Workers' Conference consisting of Locals 30, 47, 235, 392, 397, 473, 504, 537, 539, 562 and 269 of the Sheet Metal Workers' International Association.
- 3. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

4. The Board further finds, pursuant to section 144(1) of the Act, and having regard to the agreement of the parties, that all sheeters, sheeters' assistants and material handlers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all sheeters, sheeters' assistants and material handlers in the employ

of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

- 5. When the application for certification came on for hearing on February 7, 1991, there were a number of issues in dispute between the parties as evidenced by the Labour Relations Officer's Report dated January 17, 1991 and the section 89 complaint. It is unnecessary to detail these issues since the parties were able to settle many of them on February 7, 1991 and prior to the next day of hearing on March 27, 1991. By the hearing on March 27, 1991, the parties agreed:
 - 1) that Rayproof performed work in the construction industry;
 - 2) on a bargaining unit description, and
 - 3) on a list of employees.
- 6. There remained in dispute between the parties the issue of whether the petitions filed in opposition to Local 47's certification represented a voluntary expression of employee wishes and Local 47's section 89 complaint combined with its request for section 8 relief. The Board will deal firstly with the issue of the voluntariness of the petitions.
- 7. As the parties had agreed, there were nine persons employed by Rayproof in the bargaining unit on the application date. In support of its application, Local 47 filed membership evidence on behalf of six of those employees. On the two petitions filed with the Board, each containing two signatures, there were the signatures of two persons who previously had signed a membership card. The objecting employees called two witnesses, namely B. Onion and R. Matheson. Rayproof called L. Martin and M. Fortier to testify with respect to the issues in dispute. D. Mitchell, D. Kinch, T. Bullis and K. Van Iterson were called to give evidence by Local 47. In determining the facts, the Board has carefully reviewed all of the evidence before it and the parties' submissions.
- 8. Rayproof is engaged in the fabrication, supply and installation of shielded enclosures and anechoic chambers. Its Ontario office and shop facilities are located in Smith Falls. At the time of the application, Rayproof was involved in a significant project in Ottawa at the National Headquarters, Solicitor General's Building ("Sol. Gen. site"). While working at that site, the employees of Rayproof were supervised by L. Martin, a foreman.
- 9. Local 47 filed its application on November 16, 1990 and the Registrar fixed a terminal date of November 30, 1990. As noted earlier, the Board received two timely petitions opposing the certification of Local 47. No one appeared at the hearing to give evidence concerning the preparation, origination and circulation of the petition dated November 29, 1990 which was sent to the Board by registered mail on November 29, 1990. Accordingly, the Board is not in a position to give any weight to the signatures on this petition. In any event, the signatures on this petition were not relevant. Mr. Onion appeared at the hearing and he and Mr. Matheson gave evidence concerning the origination, preparation and circulation of the petition dated November 26, 1990 which was sent to the Board by registered mail on November 28. The evidence from these witnesses concerning the actual preparation and circulation of the petition, the details of which we find unnecessary to set out in this decision, could support in isolation a finding of voluntariness. However, such evidence cannot be viewed in isolation and it is necessary to review the events which immediately preceded the preparation of the petition on November 14 and 15, 1990.

- T. Belleville, a Local 47 representative, attended at the Sol. Gen. site on two occasions 10. on November 14, once during working hours and at the end of the shift. On both occasions, Rayproof employees signed applications for membership in Local 47. When Belleville first approached Rayproof employees during the workday on November 14, the employees were on a break. The discussion between Belleville and the employees was not extensive and briefly canvassed the advantages of union membership. When Belleville left the jobsite, employees had further discussions amongst themselves. At some point, one of the employees, G. Robb, telephoned Rayproof's office and advised M. Fortier, Rayproof's Project Manager, that Belleville was on site talking to employees. Fortier instructed Robb to tell Martin to call the office. Robb did as he was told and when Martin called Rayproof, Fortier was engaged in a telephone conversation with P. Currie, the General Manager, who at the time was in the United States. During a conference call, Fortier, Currie and Martin discussed some business matters and then turned to a discussion of the union situation. Currie's "knee jerk" first suggestion was to fire all of the employees on site. It appears that Fortier and Martin convinced him that such a response was not wise. They then discussed sending the crew home for the remainder of the shift, but this notion was also discarded. Ultimately, it was decided that the status quo would be maintained and that Fortier would obtain some legal advice. When Martin returned to the employees, he told them the essence of his conversation with Fortier and Currie, including Currie's initial reaction that they should all be fired. The employees had some further discussion about the union and then returned to work. Belleville was contacted later in the afternoon and did come to the jobsite in order to secure additional membership evidence.
- Fortier called Martin at approximately 5:00 p.m. on November 14 and told him that he would be at the site on the following day to talk to the employees. Fortier testified that Martin had given him the impression that there was a considerable amount of tension and uncertainty amongst the employees concerning future work on the site. Fortier did talk to the employees during the morning of November 15 for approximately half an hour. It is unnecessary to review all of what Fortier said and the details of the discussion that occurred between Fortier and the employees. Fortier began by advising the employees that no one would lose his job over union activity and that Rayproof could not stop them from joining a trade union. A number of employees at the meeting had been hired on a temporary basis and Fortier pointed out that for them and Rayproof this was a probationary period. Fortier made reference to the unique nature of the installation work performed by Rayproof and that even though the work was sporadic, Rayproof was trying to create a work force in the Smith Falls area from which it could draw. Fortier did compare Rayproof's hiring philosophy with what he understood to be the way the union's hiring hall system worked. The gist of the point being made by Fortier was that Rayproof's plan to train and use Smith Falls' employees in the future for its sporadic work requirements would be jeopardized with a hiring hall scheme requiring it to seek employees from Local 47. Fortier also referred to the possible purchase of another plant in order to permit Rayproof to diversify and expand. At the conclusion of the meeting, Fortier reviewed the progress of the job with Martin and then left. Fortier conceded that this was the first time he had held a meeting with all employees at a jobsite.
- 12. The onus is on objecting employees to satisfy the Board on the balance of probabilities that the petition represents a voluntary expression of employee wishes. When assessing the voluntariness of a petition, the Board has often noted that it has regard to the overall environment in the workplace, as well as the responsive nature of the employer-employee relationship. Having regard to the evidence before us and the parties' submissions, the Board is not satisfied that the relevant petition filed with the Board represents a voluntary expression of employee wishes given that it was prepared and circulated shortly after the events of November 14 and 15, 1990.
- 13. Although Rayproof did not take any direct action with its employees on November 14 or prior to the terminal date, the message conveyed to employees by Martin was that Rayproof

considered unionization to be a serious matter and that Currie had considered serious employment consequences for the employees if they elected unionization. It is not surprising that employees did have some concern about work at the Sol. Gen. site once they were advised that Currie considered firing everyone on the site. Fortier testified that his purpose in meeting with employees on November 15 was to calm them down and he did advise them that no adverse consequences would flow from a decision on their part to select a trade union to represent them. However, reasonable employees who heard Fortier's comments at the meeting of November 15 would more likely than not have concluded that their future employment with Rayproof may have been in some jeopardy if they selected Local 47 to be their bargaining agent. Fortier's comments concerning Rayproof's hiring philosophy in the context of sporadic work as opposed to what could occur if Local 47's hiring hall procedure was to apply sent the message to employees that their long-term employment interests may be enhanced by opposing the certification of Local 47. In effect, the consequences of Fortier's comments gave employees the choice of Local 47 as their bargaining agent with whatever work Local 47 might be able to obtain for them and continuing to work for Rayproof. When one examines the petition activity in the context of the totality of the events of November 14 and 15. the Board is not satisfied that the petition represents a voluntary expression of employee wishes and accordingly, will give it no weight. As a result of this determination, it is unnecessary to deal with Local 47's claim for section 8 relief.

- 14. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 30, 1990, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
- 15. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 2 above in respect of all sheeters, sheeters' assistants and material handlers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

- 16. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all sheeters, sheeters' assistants and material handlers in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.
- 17. We now turn to the section 89 complaint in which Local 47 alleges that T. Bullis, D. Kinch and K. Van Iterson were treated by Rayproof contrary to the Act. These three grievors were laid off by Rayproof and their last day of work was January 11, 1991. Local 47 takes the posi-

tion that there was work available for the grievors subsequent to January and that Rayproof's decision not to offer further work to the grievors was based on their support for Local 47.

- The three grievors, as well as some other employees, were hired by Rayproof as instal-18. lers during the Fall of 1990 to work on the Sol. Gen. site in Ottawa. It appears that at the time of hiring, Rayproof knew that the grievors had previously worked for a firm where Local 47 held bargaining rights. The grievors were advised that they were being hired on a temporary basis for the Sol. Gen. project which was expected to last for approximately twelve weeks, after which they would be laid off. Once the installation work was essentially completed, Rayproof decided to lay off the three grievors and R. Matheson, the most junior employee, at the end of the week of January 7, 1991. For reasons not necessary to set out, Rayproof discovered it was necessary to keep one of the four laid-off employees on a little longer. Rayproof asked Matheson if he would stay on and he agreed to do so. Matheson continued to work at the Sol. Gen. site for a short while and then performed other work for Rayproof where required. In reviewing the evidence concerning what work would have been available to the grievors subsequent to January 11, 1991, the Board is satisfied that the only work any of the grievors could reasonably have expected to be considered for was the work performed by Matheson. In other words, there was only work for one person. No additional persons were hired in the shop and Rayproof did not commence any other projects during the relevant time. Rayproof did rehire a person for a job at Shirley's Bay, but we are satisfied that its decision not to offer this job to one of the grievors was not contrary to the Act. In essence, the Board is left with the issue of why Rayproof continued to employ Matheson and whether its decision not to continue to employ the grievors was in part contrary to the Act.
- 19. Rayproof's decision not to offer continued employment to the grievors was based, as Fortier maintained in his evidence, on its understanding that the three grievors did not want to continue working. Matheson, on the other hand, had expressed a desire to continue working for Rayproof. Martin testified that during the week of January 7, 1991 he canvassed all the grievors about whether they would want to work for Rayproof at some point in the future after the lay-off. Martin stated that each grievor responded by saying that they did not want to work for Rayproof in the future. Martin conveyed this information to Fortier who later decided to offer continued employment to Matheson.
- 20. In their evidence before us, the grievors denied that Martin asked them whether they wished to work for Rayproof in the future and that their response was a negative one. After examining the evidence on this issue, the Board prefers the evidence of Martin. The three grievors conceded that it was not uncommon for all of them to express a desire to be laid off or in some other way indicate an inclination not to work for very long for Rayproof. They claimed that any comments they made along these lines were made in a joking fashion. Although denying that he indicated to Martin during the week of January 7 that he did not want to work for Rayproof in the future, Kinch indicated that any response that was made was made in a joking manner. In cross-examination, Kinch further agreed that Martin was probably not wrong if he did not interpret the response of the grievors in a joking manner. In examining Martin's evidence and the evidence of the three grievors, the Board is satisfied that the grievors made comments to Martin which could reasonably be relied upon by Rayproof as an indication that the three grievors did not want future employment with Rayproof.
- In deciding the section 89 complaint, the Board has had regard to Rayproof's probable knowledge of the grievor's support for Local 47, as well as the events of November 14 and 15, 1990. However, the Board finds as credible Fortier's contention that the only reason he did not offer any of the limited work that Matheson continued to perform to one of the grievors was because of his understanding that they did not want such work. In the Board's view, Rayproof has

satisfied the onus upon it to demonstrate that its treatment of the grievors was not contrary to the Act. In reaching this conclusion, the Board notes that it did not take into account any of the evidence or submissions of R. Matheson which were directed to the section 89 complaint.

22. Accordingly, the section 89 complaint is dismissed.

1754-90-M Graham Smith, Allen Ouellette & Charles Wilburn, Complainants v. Fred Marr, Financial Secretary, Treasurer, Business Manager, Local 700, International Association of Bridge, Structural and Ornamental Ironworkers, Respondent

Financial Statements - Settlement - Counsel for union accepting settlement terms put to him by counsel for complainants - Complainants later repudiating settlement before their counsel sending confirming letter to union counsel - Board finding that confirmation, in this case, not representing the last step to reaching agreement but, rather, involving merely the post-agreement paperwork - Board concluding that matter settled and exercising its discretion under sub-section 85(2) of the *Act* to decline to inquire further into matter

BEFORE: Judith McCormack, Vice-Chair, and Board Members W. H. Wightman and C. McDonald.

APPEARANCES: Graham E. Smith, Allen Ouellette and Charles Wilburn for the complainants; S.B.D. Wahl and F. Marr for the respondent.

DECISION OF THE BOARD: October 24, 1991

- 1. This is a complaint under subsection 85(2) of the *Labour Relations Act* alleging that a financial statement furnished by the respondent is inadequate.
- 2. At the commencement of the hearing, the respondent asserted that the complaint had been settled and that the Board should not hear the merits of the case. After receiving the parties' evidence and submissions with respect to this issue, the Board concluded that the matter had indeed been settled, and exercised its discretion under section 85(2) to decline to inquire further into the matter. We advised the parties our reasons would follow. These are those reasons.
- The evidence indicates that the complainants retained the law firm of Paroian, Raphael, Courey, Cohen & Houston some months ago to represent them in this matter. On Thursday, September 26th, the complainants were scheduled to meet with Brian Nolan, a member of that firm, for the purpose of preparing for these hearings which were to continue on October 1st. On Wednesday, September 25th, Steven Wahl, counsel for the respondent, contacted Mr. Nolan and made a proposal to him for settling the matter. Mr. Nolan indicated to Mr. Wahl that he would be meeting with his clients the following day and would discuss the proposal with them at that time. Mr. Nolan and Mr. Wahl also had a telephone conversation on Thursday, September 26th, shortly before Mr. Nolan's 4:00 p.m. appointment with the complainants in which Mr. Nolan agreed that he would call Mr. Wahl at 5:00 o'clock that day to confirm whether there had been a settlement or not.

- 4. The initial proposal put to Mr. Nolan by Mr. Wahl was that the complaint would be settled on the basis that the respondent would supply audited financial statements for both the respondent and the Ironworkers, Local 700 Office and Training Centre Corporation. Two of the complainants, Graham Smith and Charles Wilburn attended at the appointment with Mr. Nolan, and they discussed this proposal with him. Peter Hrastovec, one of Mr. Nolan's colleagues, was also present. As a result of their discussions, Mr. Smith and Mr. Wilburn were ushered into an area where they could smoke, and Mr. Nolan called Mr. Wahl and indicated more specifically which financial statements the complainants wished to have. These were the audited financial statements for the respondent for the fiscal period 1987-1988, and the financial statements for the Ironworkers, Local 700 Office and Training Centre Corporation for the fiscal periods 1989-1990 and 1990-1991. In return, the complainants were prepared to withdraw their complaint without prejudice to their right to file a fresh complaint in the event the financial statements supplied were inadequate within the terms of section 85(2).
- When Mr. Nolan put these terms to Mr. Wahl, Mr. Wahl agreed to them, and Mr. Nolan indicated that since his secretarial staff had left for the day, he would confirm the agreement in writing the following day. Mr. Nolan then went back and confirmed with Mr. Smith and Mr. Wilburn, who were awaiting the results of the telephone call, that Mr. Wahl had agreed to their terms. After a brief discussion, Mr. Smith and Mr. Wilburn left Mr. Nolan's office.
- Shortly thereafter, Mr. Nolan began to draft a letter to Mr. Wahl setting out the terms of the agreement. That evening, however, Mr. Smith and Mr. Wilburn discussed the matter with their wives and with Mr. Ouellette who had not been present at the appointment. It appears at that point that they began to have second thoughts about the settlement, particularly since the proceedings to date had been costly and the settlement did not address those costs. They were concerned, as Mr. Smith testified, that they had left the impression with Mr. Nolan that they had agreed to the settlement, and according to Mr. Wilburn, "it kind of was like maybe we were". As a result, they attempted to contact Mr. Nolan. However, at this point it was approximately 7:30 p.m. and no one was in the office. Mr. Smith then tried to contact the law firm the following morning and left a message with a secretary to the effect that the complainants did not agree to the deal. Mr. Nolan, when advised of this, was of the view that an agreement had been reached the night before, and that he could not resile from it and continue to act on behalf of the complainants. He instructed Mr. Hrastovec to call the complainants, communicate this to them, and tell them that unless he had instructions to send the confirming letter he had drafted by noon, the law firm could not continue to act for them and they could pick up their file. Subsequently, Mr. Nolan withdrew as the complainants' counsel.
- 7. The Board has in its jurisprudence attempted to encourage settlement by ensuring that settlements will be reliable and final endings to the applications or complaints before it. In *Tony Hoosain*, [1987] OLRB Rep. Dec. 1513 the Board had this to say on the subject:

Each year, trade unions, employees, or employers file hundreds of applications or complaints before the Board. A great majority of them are settled. Sometimes the settlement favours a trade union or the employer. Sometimes it may favour an employee. Usually the settlement represents a compromise under which the parties neither achieve as much nor risk as much as they would by proceeding to a hearing before the Board. The parties generally arrive at a settlement in order to avoid the cost and uncertainties of litigation. Both the orderly resolution of Board proceedings and the efficacy of the settlement process would be gravely prejudiced if, having signed minutes of settlement, a party could afterwards repudiate that settlement and revive the original proceedings because s/he later had second thoughts about the settlement terms.

8. In that case, the settlement was in writing. However, the Board has made it clear that

even an oral settlement may result in it declining to inquire further into a complaint. For example, in *Madeleine Cloutier*, [1988] OLRB Rep. Apr. 375, the Board said as follows:

One of the distinguishing features of labour relations is that it operates in the context of continuing relationships. For that reason, among others, settlements are particularly desirable and the Board has accorded considerable priority to efforts towards this end. It is also essential that the Board's jurisprudence provide a legal climate which encourages and reinforces this goal. If parties to labour litigation cannot rely on their agreements, the Board's settlement processes may be rendered almost worthless. With respect to section 89 complaints, the Board has noted in the past that it has a discretion with respect to its inquiry. It has also declined to proceed further with a complaint in the exercise of that discretion where the parties have reached a settlement. (See, for example, C. E. Jamieson & Co. (Dominion) Limited, [1985] OLRB Rep. March 375).

- 9. The basis of the Board's discretion under section 89 is the permissive wording contained in section 89(4) to the effect that "the Board may inquire into the complaint" (emphasis added). Section 85(2) contains identical wording, and we conclude that we have a similar discretion with respect to complaints filed under that section. There is no question as well that the Board's policy considerations with respect to encouraging settlement and promoting orderly and final resolutions of cases are as compelling in these circumstances as in cases brought under section 89.
- 10. In this case, Mr. Nolan proposed specific settlement terms to Mr. Wahl on behalf of the complainants and Mr. Wahl accepted them on behalf of the respondent. There was no dispute as to those terms, and both Mr. Nolan and Mr. Wahl were of the understanding that a settlement had been reached at 5:00 p.m. on September 26th. Some of the complainants' confusion stemmed from the fact that Mr. Nolan was to confirm the settlement in writing the following day. However, it was apparent from the evidence that the settlement was in fact complete on September 26, 1991. The purpose of the confirming letter was merely to recite the settlement terms, a standard precaution in the circumstances. There may well be occasions in which the settlement process unfolds in a manner where written confirmation of some kind represents the last step to reaching agreement. However, in this case confirmation involved merely the post-agreement paperwork. In these circumstances, we found that the settlement was concluded on September 26th. The fact that Mr. Nolan's confirming letter was not sent does not suggest otherwise, given the subsequent dispute between the complainants and their counsel.
- There was some argument on the part of the complainants to the effect that Mr. Nolan was not authorized to enter into the settlement. There is no doubt that Mr. Nolan was retained by the complainants at the time he entered into the settlement and held himself out to Mr. Wahl as having that ostensible authority. However, we also wish to make it clear that we find that the complainants did agree to the settlement, and only started having second thoughts several hours later. There was no suggestion that Mr. Smith and Mr. Wilburn did not have authority to agree to the settlement on behalf of Mr. Ouellette, and in fact, the evidence points to the contrary.
- 12. As a result of our findings in this regard, we were not prepared to inquire further into the complaint, and the complaint was dismissed.

1686-89-U Windsor Printing Pressman and Assistants' Union, Local 274, Complainant v. **Sumner Press Ltd.**, Respondent

Duty to Bargain in Good Faith - Unfair Labour Practice - Union alleging that employer engaging in pattern of bargaining designed to avoid collective agreement altogether - Board satisfied that employer prepared to sign collective agreement provided it contains economic concessions and cost-saving measures - Bargaining stance held not to be in breach of the duty to bargain in good faith - Employer's sole motivation was to achieve an agreement with substantial concessions, not to eliminate the trade union - Complaint dismissed

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members G. O. Shamanski and B. L. Armstrong.

APPEARANCES: Dana Randall, Gladys MacPherson, Don Oliver and Mark Spencer for the complainant; Angela Rae and Kai Friis for the respondent.

DECISION OF R. O. MacDOWELL, ALTERNATE CHAIR, AND BOARD MEMBER G. O. SHAMANSKI; October 18, 1991

Ι

- This is a complaint under section 89 of the *Labour Relations Act* alleging that the respondent company has contravened sections 3, 15, 64, 66, 70 and 71a of the Act. The union contends that the company has engaged in a pattern of collective bargaining designed *not* to achieve a collective agreement on its own terms (which the union concedes is lawful), but rather to avoid a collective agreement altogether, and to eliminate the union presence from the workplace. The union argues that the company has improperly demanded wage concessions, resisted a strike, and engaged in what the union describes as "surface bargaining", lacking any real intention to conclude a collective agreement. In the union's submission, the company's purported concerns about its financial position are a mere pretext for an illegal scheme to "break the union".
- 2. The company concedes that it has engaged in hard bargaining in pursuit of its economic self-interest, and has demanded a collective agreement on more favourable terms. The company maintains, however, that the concessions to which the union objects are part of a lawful strategy to reverse serious financial losses and improve the long-run profitability of the business. In the company's submission, it is not illegal to demand concessions, even though the union may regard them as a distasteful retreat from the status quo; nor are such concessions any more inherently illegitimate than those which trade unions routinely demand from employers in every round of negotiations, including the one currently under review. The company points out that a "concession" is a matter of perspective, and that collective bargaining is a "two-way street". In the company's submission, the status quo is a reference point for bargaining, not a legal entitlement.
- 3. This matter was litigated over some seventeen days, and by the end of the hearings (which probably consumed more time than the parties spent at the bargaining table) the Board had a fairly complete picture of the course of bargaining, including the positions taken from time to time, the parties' strategies and miscalculations, and the union's mounting frustration at the company's plea that it had lost a lot of money and that the road to financial recovery required cost-cutting measures and enhanced productivity. By the end of the hearing, the Board had before it voluminous and varied testimony about incidents which, while sometimes lacking in clarity or context, were said by the union to point to the company's illegal intentions, and by the company to point to

the union's inability to match its bargaining objectives to economic and collective bargaining reali-

- 4. We do not think that any useful purpose would be served by reviewing all of those details here. It will be sufficient to set out a general overview of the evolution of the parties' dispute. Before doing that, however, it may be appropriate to briefly state the statutory framework within which the parties' rights must be determined. The most important provisions are sections 15 and 64 of the Labour Relations Act which read as follows:
 - 15. The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

* * *

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

П

- 5. The law in Ontario establishes free collective bargaining as a preferred method for determining terms and conditions of employment. It requires an employer to genuinely recognize a trade union as the employees' bargaining agent, and engage in a sincere effort to reach a collective agreement. But the law does not prescribe the contents of that agreement or require the bargaining parties to make any particular concessions; nor is there unlawful interference merely because a trade union may be obliged to conclude a collective agreement on terms less generous than those it proposes, or those embodied in a previous contract. The employer's liability does not depend upon the union's appetite for compromise, or on its own, and the law does not protect either party from the loss of face or other consequences flowing from its own miscalculations.
- Collective bargaining law involves an important balance: legal pressure to engage in negotiations and conclude agreements determining the terms of employment, but freedom from legal prescription as to what those terms will be. The Labour Relations Act specifies a few minimum requirements to which all collective agreements must conform, but apart from that, the parties are free to fashion their own terms of agreement. Even in the critical and contentious areas of "union security" and arbitrability the Legislature has moved cautiously, amending the statute (twice) to prescribe a compulsory checkoff as a statutory minimum, and make it clear that restrictions on arbitrability such as mandatory time limits or specific penalties should be expressly spelled out in the parties' agreement (see sections 43, 44(6) and 44(9) of the Act). Indeed, not only does the statute say nothing about the key economic provisions of the agreement (wages, benefits, hours of work, premium pay, and so on) neither does it specify particular grievance procedures, recognition of seniority, "just cause" protection, or a schedule of management rights - all of which are important parts of the bargain which can usually be found in most collective agreements in some form or other (and, in some cases, have been the subject of explicit legislative prescription in other collective bargaining statutes). On all of these important issues, the Act remains totally silent; and the Board has no mandate under section 15 to impose terms, or set what, in its view, is an appropriate wage rate, an acceptable level of profit, or suitable work rules (even assuming there were "objective" criteria for doing so in a private sector context). In this regard, we observe that a system of free collective bargaining differs significantly, not only from a regime of individual bargain-

ing, but also from modified bargaining models (in the hospital sector, for example), where the parties have no right to resort to economic sanctions, and the terms of agreement are ultimately imposed on the bargaining parties by someone else. (First contract situations are a hybrid: free collective bargaining coupled with conditional access to interest arbitration for the first round of bargaining - see section 40a of the Act).

- 7. These considerations are not new to the Board or to its analysis of the duty to bargain in good faith. In *Radio Shack*, [1979] OLRB Rep. Dec. 1220 the Board observed:
 - 66. ... The duty to recognize a trade union and to bargain in good faith does not require an employer to enter into any collective agreement proposed by a union. It is apparent from the structure and history of the legislation that the Legislature has assumed that the parties are best able to fashion the details of their relationship. The assumed strength of this approach is that labour and management are more likely to accept an employment relationship which they themselves create than one that is imposed on them. So too, their agreement is likely to be more accommodative of the economic and social demands that each faces. Accordingly, both parties are entitled to bargain hard for the agreement that they believe to be acceptable. This is so even if one of the parties has an overwhelming strength at the bargaining table and is able to achieve most or all of its needs. The exercise of such raw bargaining power in good faith does not offend the bargaining duty imposed by this Act. See York Regional Board of Health (1978), 18 L.A.C. (2d) 255 at page 263 (Adams).
 - 67. Thus, from an employee viewpoint the right to engage in collective bargaining is not a right to achieve the terms of employment employees may wish. It is simply an opportunity to combine together to try and achieve their needs with the possibility that economic realities will dictate quite a different result in any particular situation. This perspective of the bargaining duty was explained by the Board in *CCH Canadian Limited* [1974] OLRB Rep. June 375 at page 381 in the following way:

"There was no evidence to suggest that the company's position on these items was other than "hard bargaining". There is no requirement that a company must make concessions or agree to a particular agenda of discussions. The parties met often and bargained hard. Because the union might have to accept an agreement "tailored to the company's measurements", to use a modified version of Mr. Peacock's own chosen words, is no reason to conclude that the company was bargaining in bad faith. (See Regina ex. rel. Hearn v. Norfolk General Hospital [1957] 119 C.C.C. 290 (Ont. Mag. Ct.). There was no evidence to suggest that the company was unprepared to sign an agreement; but of course it wanted an agreement on its own terms. Collective bargaining is redolent of self interest and without evidence to suggest that the company's terms were so unreasonable as to suggest that, in reality, it wanted no agreement and no trade union, the Board is unprepared to grant the application."

In Canada Trustco Mortgage Company, [1984] OLRB Rep. Oct. 1356, the Board had this to say:

30. We have juxtaposed these various passages, because, in our view, it is important to reiterate both the substance of the bargaining duty, as well as its limitations. In recent years the Board has been scrupulous to protect the framework of collective bargaining: the independence of the union, the integrity of its role as the employees' exclusive bargaining agent, and the right to information necessary for it to properly perform its statutory role. But the Board has been equally clear that it will not act as interest arbitrator, or prescribe the precise contents of the parties' collective agreement - even in the face of an "egregious" breach of the duty to bargain in good faith (see *Radio Shack*, *supra*). The content of the agreement is for the parties to determine, in accordance with their own perceived needs and relative bargaining strengths. The legislation enables employees to combine together to bargain collectively and compels the employer to recognize their bargaining agent. It further provides a framework within which there can be an exploration of the parties' differences and a sincere effort to reach some accommodation. Despite the adversarial aspects of collective bargaining, there are substantial areas of mutual interest between employers and employees which informed discussion may reveal. But the statute does not *require* any particular concessions, nor does it stipulate the content of a collective

agreement, or even that a collective agreement always must be the necessary outcome of the parties' bargaining.

- 31. One cannot guarrel with the proposition that the "duty to bargain in good faith" must encompass an obligation to engage in informed and rational discussion, and in exceptional circumstances an employer's position at the bargaining table may be so patently unreasonable or devoid of apparent business justification as to evidence a desire to avoid any collective agreement altogether. So may an unexplained retreat from a previous agreed position, or the untimely insertion of new issues into the bargaining process. However, the Board must be careful that in adjudicating disputes and giving a reasoned elaboration for its decisions, it does not impose its own model of decision-making as the normative standard for the collective bargaining process. Collective bargaining is not simply a matter of presenting proofs and reasoned arguments in an effort to achieve a favourable outcome, nor is that outcome necessarily arrived at, or explained, by a logical development from given and accepted premises. It is a process in which reason plays a part - but not the only part. There may be a range of potential outcomes or solutions and the ultimate result may have more to do with economic strength than abstract logic. In particular collective bargaining situations there simply may not be any commonly accepted principles or criteria and, in consequence, no objective basis for distinguishing a "claim of right" from a "naked demand". Reason and self-interest are inextricably intertwined. Ultimately the parties may reach agreement only because of a realistic appraisal of the value of their objectives in relation to their ability to obtain them, including the costs they are able to inflict on one another. It may have little to do with what some outsider might consider a "fair" settlement, or a just allocation of rewards to capital and labour.
- 32. Rational discussion is an important aspect of the bargaining process. So is power. Persuasion is an effective tactic to gain one's bargaining objectives. So is economic pressure. Whether that system actually results in a "just wage" or "distributive justice", we leave for others to debate. Collective bargaining permits that outcome, but it does not compel it. (For an interesting analysis of the impact of collective bargaining see: *What Unions Do* by R. B. Freeman & J. L. Medoff, Basic Books, New York, 1984.)
- 33. The facts of this case provide a graphic illustration of the absence of shared principle, and the predominance of bargaining power as a means of settling the parties' collective bargaining differences. The union seeks to limit the exercise of managerial authority and achieve for its supporters, terms and conditions of employment not only more generous than the employer is willing to pay, but also more generous than the employer is currently paying to hundreds of other employees in identical circumstances. The employer seeks to maintain its managerial prerogatives and provide levels of remuneration consistent with its own assessment of its needs, its own organizational imperatives, and its own perception of the dictates of the market place. There is no obvious way of reconciling these competing interests, nor is there any reservoir of principle to which one can resort to provide the "right answer". No amount of rational discussion or reasoned elaboration will necessarily produce an accommodation. Nor can there always be such accommodation in our system of free collective bargaining which ultimately rests, as it must, on the right of parties to resort to economic sanctions in pursuit of their own self-interest as they define it. Under our statute their only obligation is to endeavour to conclude a collective agreement and if that is the true intent, neither the content nor the consequences of that agreement are of any concern to the Board.
- 34. This is not to say that collective bargaining must always be a "zero sum game", or that there cannot be substantial areas of mutual accommodation and joint decision-making. But our statute mandates collective bargaining, not co-determination. Co-determination, or co-partnership may be the *result* of collective bargaining, but it is not an outcome required by law. Nor was the duty to bargain in good faith designed to redress an imbalance of bargaining power. A party whose bargaining strength allows it to virtually dictate the terms of the agreement does not thereby bargain in good faith, and that proposition is applicable whether it is the union or the employer which "has the upper hand".
- 8. These passages all highlight the essential issue in this case: was the company merely pressing its superior bargaining power in order to achieve a collective agreement on its own terms; or does its conduct evidence a desire not to conclude any collective agreement at all. We prefer this

statement of the issue to one invoking the term "anti-union animus" as the union did in argument. Whatever utility that concept may have in traditional unfair labour practice cases, it loses both precision and analytical power in a bargaining context where any resistance to union proposals can be characterized, loosely, as "anti-union", and any lost strike will probably undermine the union's credibility and effectiveness. The fact is that employers are entitled to rely on their bargaining power to contain union initiatives which increase the cost of doing business, or regulate the way in which work is assigned, just as a trade union is entitled to use its bargaining power to raise employee wages, control the introduction of technological change, limit the ways in which the employer can allocate work, or require the employer to hire only from the ranks of unemployed union members. And, of course, many employers would probably prefer not to have to deal with a union and may be candid enough to say so. In that sense, those employers may be labelled "anti-union". The question, though, is whether such anti-union attitudes produce conduct proscribed by law.

III

With this background, then, we return to an overview of the facts. In making these findings, we have taken into account the relative credibility of the witnesses, based upon such factors as: their demeanour when giving evidence; the clarity, consistency, and overall plausibility of that evidence when compared with that of other witnesses, and subjected to the test of cross-examination; the witnesses' ability to distinguish fact from suspicion or belief, and resist the tug of self-interest when framing their answers; and what appears to the Board to be most plausible in all the circumstances. In the case of the union witnesses, it was particularly important to differentiate between what they actually heard or saw, and what they believed to be the respondent's intentions. It is also important to recognize that the parties came to the bargaining table, and later gave evidence about the bargaining, from very different perspectives, and had quite different expectations about their "entitlements". Finally, because for a considerable period of time, the bargaining and the litigation proceeded, in tandem, the distinction became increasingly blurred. We will have something to say about that below.

IV

- 10. The company runs a small printing business in Windsor, Ontario. Until relatively recently, that business has concentrated on the production of flyers, brochures, small magazines, and other low volume items for local customers. The company has operated on this basis for some time.
- The union has had a presence in the business for many years, representing a craft unit of employees who work on the presses and in the plate room. The number of employees in the bargaining unit has declined significantly in the past few years and now numbers a little over a dozen. This represents a small proportion of the company's total work force which has fluctuated between forty and sixty employees in recent years, depending upon the vagaries of the market place, and corporate changes to which we will refer in more detail below. None of these other employees are represented by a trade union.
- 12. In 1986 Sumner was purchased by Ernie Olde. Mr. Olde is an entrepreneur and discount securities broker with business interests in the United States and Canada. The Olde enterprises employ, in total, about 1,000 workers, the vast majority of whom are in the United States.
- 13. At the time of the purchase, Sumner was not a particularly healthy business. Its major asset was a tax loss which could be applied against future profits if there were any. However, Mr. Olde's existing businesses generated a significant volume of printed material, and with that assured

customer base, an infusion of capital, and a significant restructuring, Mr. Olde hoped to make Sumner a profitable venture. Mr. Olde anticipated that Sumner would serve as the printing arm of the Olde enterprises, and in addition, would develop new customers which also required high volumes of quality printing. But that required a change in market orientation, and a lot of new equipment.

- At a total cost of about four million dollars, Sumner acquired a sophisticated multi-colour Web press and began to construct an addition to its building to accommodate the new press, related machinery and paper stocks. Among the financing arrangements for this new equipment was a federal government grant. This federal funding was made available on condition that ninety per cent of the output from the new machinery would be exported, and that the equipment purchased would "not be utilized so as to adversely affect other commercial printing operations in Canada". This was consistent with Mr. Olde's own business plan: an expansion into the America market where the productivity of the Web press would give Sumner a competitive advantage despite lower American wage rates. Sumner anticipated new customers and new competitors.
- 15. It remains to be seen whether Mr. Olde's ideas and investment will eventually make Sumner a profitable operation. In the years immediately following its purchase, the company was plagued by management and production problems at all levels. An early discovery was that the senior management of Sumner had misrepresented the financial health of the business, failed to maintain accurate reports, and either resisted or were incapable of implementing the changes that Mr. Olde thought necessary. That precipitated their departure. There were parallel changes in operations, production and sales personnel, either because they did not perform to the company's expectations, or left to pursue other endeavours. Customers were tardy in their payments, or did not generate sufficient demand to produce a reliable profit. There were also difficulties with paper supplies and suppliers.
- 16. By contrast, relations with the union were initially quite amicable. In view of the significant changes then on-going or projected, the union agreed to extend the existing collective agreement for a two-year period, with only minor amendments, and the addition of a cost of living clause. In effect, in the last round of bargaining, the parties agreed that, for the time being, they would maintain the collective bargaining status quo. These arrangements were concluded without a strike or third party mediation.
- 17. Before dealing with the current round of bargaining, it is necessary to say something about Mr. Olde's attitudes and management style. Both were the subject of comment in the present proceedings, and there is little doubt that the collective bargaining atmosphere was influenced by the fact that Sumner had a new owner who was determined to put his own imprint upon the business. And, having taken a risk and invested significant sums, he was also determined to turn a profit.
- Mr. Olde is an energetic entrepreneur and an unabashed advocate of free enterprise. For Mr. Olde, business is a challenge, and its objective is success; moreover, in his view, profitability depends upon flexibility, productivity, and aggressively seizing the initiative in an increasingly competitive market. Mr. Olde does not play an active role in his various businesses, preferring instead to delegate authority to local management, on the understanding that they will be rewarded if they perform, and removed if they do not. He is solicitous about his money, and has little tolerance for those who waste it.
- 19. In Mr. Olde's opinion, trade unions are a fact of life that he is obliged to recognize, but they sometimes resist change or inhibit productivity, to the ultimate detriment of both the business and its employees. So long as a company is privately owned and operates in a competitive market,

the return on investment and the workers' job security both depend upon its ability to operate profitability; and, in Mr. Olde's view, that requires a realistic accommodation to the needs of the market. Without a profit, there will eventually be no business or jobs.

- 20. Such views are not particularly novel these days, and they help to explain both Mr. Olde's determination to turn the business around, and the company's efforts to effect the changes it thought were necessary to use the new press efficiently and make inroads in the American market. Among those changes were modifications to the old collective agreement in order to reduce labour costs, and make it easier to schedule the longer production runs which the Web made possible. Other proposed changes would make it easier to move to a multi-shift, continuous operation or avoid dislocation if a number of key, but senior, employees all decided to take their vacation at the same time. From the company's perspective, the old agreement had its roots in a different time and technology. It did not reflect current economic pressures or prospects.
- 21. From the union's perspective of course, Mr. Olde's views were very troubling, and his efforts to restructure the business represented a distinct departure from the rather congenial, "lais-sez-faire" relationship with the previous owners. Mr. Olde was portrayed as something of a capital-ist mercenary, determined to extract a profit from the business at the expense of its employees if necessary.
- 22. There is an element of truth in this assessment. Mr. Olde had limited appetite for financial losses, and the company came to believe that changes in the employee compensation package and work rules were a necessary condition for financial recovery at least in the short run. Concessions were imposed unilaterally on the unorganized majority, and were pressed vigorously at the bargaining table. For its part, the union initially demanded significant improvements and resisted concessions, but ultimately retreated, reluctantly, to an insistence on maintaining the status quo.
- 23. There is an element of truth in Mr. Olde's view as well because, from time to time unions do resist change as the complainant did here. From the company's perspective, however, changes were imperative; the status quo has never been "in the cards". That was the basis for the 1987-89 collective agreement extension, but it was never the company's position in the current round of bargaining or throughout this litigation. In this round, the company was determined to cut labour costs and improve productivity. Whatever its motive may be, the company has never embraced the status quo, and the use of that term was the source of much misunderstanding and miscalculation. We will return to that theme later.
- Jeffrey Slopen is among those in whom Mr. Olde has confidence. Mr. Slopen is a partner in a Windsor law firm, and a member of the bars of Ontario and Michigan. But he is much more than the company's solicitor. He is an officer, independent director, and business advisor, who has been involved with Mr. Olde's business endeavours for a number of years. Mr. Slopen arranged for the acquisition of Sumner in 1986, and negotiated the collective agreement extension to which we have referred. In both cases, he acted on his own, within very general parameters set by Mr. Olde. Mr. Slopen was also the company's spokesman in the most recent round of bargaining. As before, he had considerable latitude to pursue what he considered to be in the company's best interests.
- 25. In May 1989 the union submitted its proposals for a new collective agreement. These included: a one year term of operation; an immediate seven per cent wage increase with additional adjustments for plate room employees; a thirty-five-hour work week, with the Web and five colour press operating on a four-day week, from Monday to Thursday; additional vacation, medical, holiday, and overtime entitlements; and a demand that when the presses were idle, maintenance work should be scheduled instead of employee layoffs. Some union witnesses testified that they knew the

company was losing money but believed that they were entitled to a significant wage increase because their wages had fallen behind those of local competitors. The evidence does not support that belief, and when cross-examined, the employees conceded that none of the local examples they cited had a Web press. The company saw its competition as being in the United States to which the company was obliged to export the output from the Web. Whatever may have been true in the past, from the company's perspective, the local print shops were no longer the appropriate reference point.

- 26. We need not decide whether the company's proposed comparisons were more valid or persuasive than those underlying the union's demands, nor does it matter whether the company's position is characterized as generous or stingy. The point is, that in this round of bargaining the parties had very different expectations and objectives.
- The company was quite surprised by the union's opening position. From its point of view, these demands represented an increase in labour costs at a time when the company was experiencing serious dislocation and financial difficulties. In fiscal 1989, the company lost almost one million dollars, and, as it turned out, despite reductions in staff and vigorous cost cutting measures, the company also registered a loss in fiscal 1990. Undoubtedly, some of the more recent losses can be attributed to the ongoing strike, but whatever their origin, the circumstances were not promising for employees expecting wage increases. And because the measures imposed upon the non-union employees did significantly reduce the company's costs, the company expected equivalent sacrifices from bargaining unit employees.
- The company's position at the bargaining table was influenced not only by these financial losses, but also by what it considered to be productivity problems and inadequate control over the production process. Some of its difficulties involved inventory controls, quality assurance, obtaining satisfactory paper supplies, and weeding out customers who did not promptly pay their bills. Others involved the existing work rules, and incidents which, though minor in themselves, pointed towards a need for more authority to assign, schedule or reallocate work responsibilities. These factors shaped both the company's bargaining positions and its inclination to stick to them. The company was not dealing with symbolism or "management rights" in the abstract. It wanted concrete changes in the way in which work was paid for, scheduled, and assigned.
- Shortly after the commencement of bargaining, the pressmen refused to do certain maintenance work which they had routinely done in the past, claiming that such work was not part of their job. A repair crew had to be brought in, at considerable expense, from Toronto. On another occasion, a press crew shut down their machines at the end of a run, but before the end of their shift, and went for a drink at a local hotel. The company was annoyed by the explanation that, in accordance with established custom and practice, it was the press crew that decided when the machines would run and when they would not. The company was also disturbed by the press crew's reluctance to fill in the time or do routine maintenance or clean up when their machines were not busy. An overtime boycott (although illegal) interfered with the operation of the presses, but the company found that there was really not very much that they could do about it.
- These events merely reinforced the company's view that it was necessary to more forcefully define and assert management's right to run the business. This, together with reducing labour costs, became a key issue in collective bargaining.
- 31. Jeffrey Slopen was the company's spokesman at the bargaining table, and the chief architect of its bargaining strategy. Despite union assertions to the contrary, we find that Mr. Olde did not play an active role, and that Kai Friis, the general manager, served only in an advisory capacity. Mr. Slopen drafted the company's initial response to the union's demands without spe-

cific consultation with or approval by either Olde or Friis, and throughout the subsequent negotiations, it was Mr. Slopen who decided what position would be taken and when. As we have already mentioned, Mr. Slopen had been involved with the company since its acquisition, he was overseeing the renovations and building extension, and he was responsible for many of the financial and legal arrangements underlining the purchase of the Web press and proposed business expansion. Mr. Slopen had settled the previous agreement without serious difficulty and without reference to Mr. Olde; and in the current round of bargaining, his only instructions were to get the best deal he could. Despite the union's assertion that Mr. Olde was "pulling the strings" in the background, we find that Mr. Slopen had the authority to sign an agreement on his own, and that he actually sought to keep Mr. Olde out of the bargaining process because he thought Mr. Olde's volatile personality might inflame the situation and inhibit settlement. On the other hand (as quickly became apparent), Mr. Slopen needed no encouragement to take a tough bargaining position, and was well aware of the fact that economic pressure was an important part of collective bargaining.

- 32. The company's first bargaining position was sent to the union in early June and involved significant concessions. The company proposed a three-year agreement with a seven and a half per cent wage cut for employees earning more than \$10.00 per hour (non-union employees were not earning that much). In addition, the company proposed a forty-hour work week, more modest and uniform overtime premiums based on time and a half rather than double time rates, and more control over the scheduling of vacations, starting times, shift changes and shift scheduling. In the company's submission, these changes were designed to reduce labour costs and make it easier to move to a multi-shift continuous operation, which, in turn, would facilitate the most profitable use of the Web technology in which the company had so heavily invested.
- 33. The union regarded these proposals as an odious retreat which was totally unacceptable. The union contends that these concessions, while later modified in magnitude and composition, were "tailored for rejection" and represent a position which no self-respecting trade union could be expected to accept. In the union's submission, these proposals were so predictably offensive that they betray an intention to derail bargaining and avoid a collective agreement on any reasonable terms.
- The opening rounds of bargaining were neither prolonged nor productive, as the company sought to establish the financial basis for its proposals and the union repeatedly refused to examine the company's financial statements or explore the consequences of the company's purported losses. Indeed, it was not until some months after this litigation began that the union finally agreed to examine the company's books. Those books, it should be noted, are audited by a large and reputable firm of accountants in accordance with standard accounting principles; moreover, these financial statements are not only required by ordinary business practice, but were demanded by the company's lenders particularly a chartered bank. Those lenders have more than an passing interest in both the accuracy of the books, and the company's ability to turn a profit.
- 35. The financial statements substantiate the company's plea that it has been experiencing serious financial losses.
- 36. Why did the union refuse for so long to examine the company's books, so that it could assess for itself, the strength of the company's purported need for concessions? Various reasons were advanced. It was said that the company had "cooked the books" so that the financial statements did not accurately reflect its true financial position. It was said that losses were irrelevant because they merely created valuable tax write-offs which could be used in the future, or transferred somehow to the benefit of other Olde companies. Union witnesses painted a picture of financial manipulation and misrepresentation. Don Oliver, giving evidence months into the bargaining

testified that, in his opinion, the company was intentionally running at a loss, so that it did not matter what the books revealed. Mr. Oliver is the local union president and its chief spokesman at the bargaining table.

- 37. All of these assertions were contradicted by the evidence and were formally withdrawn after the union and its accountants had examined the company's books. The losses were real. The company had not "cooked the books". Those losses could not be transferred to other Olde businesses. There was a genuine need to address business problems, costs and productivity.
- But the union's dogged refusal, for months, to even consider those financial statements did much to diminish its credibility in the eyes of the company which considered this behaviour both irresponsible and incomprehensible. It was a refusal to recognize what the company considered essential economic realities, and did much to sour the bargaining relationship. Nor was the company impressed by the incidents of sabotage and damage to its machinery that came to light after the employees went on strike. In short, leaving aside the company's "real motive", there was little agreement on the basic parameters for bargaining, let alone the basis for a collective agreement; and despite its earlier retreat, when the 1990 financial statements became available, the union was still raising questions (which the company again answered) about their accuracy. As late as the completion of the testimony in this case, and despite all of the evidence to the contrary, the union still seemed to be operating on the belief that the company's losses were not genuine.
- By contrast, all of the company positions were consistent with the "interest" it defined to the Board: cutting costs, improving productivity and returning the firm to a profitable operation. It did not matter very much how those savings were achieved; and in this sense the company did not have a firm "bottom line" or a fixed list of positions from which it would not deviate. It responded to the union's initial demand with wage concessions, because the union had proposed significant wage increases, and because concessions of this kind were easily identified, calculated, and implemented. In the earlier rounds of bargaining, the company modified its wage position, slightly, as a "signal" to the union of a willingness to move in this area (there was no response), but it generally concentrated on wage - related items because they were most easily referable to direct financial savings. But the company would have been equally content with a package that included wage differentials for new hires or relief from the rigid "manning" requirements in the old collective agreement. A settlement incorporating those concessions would facilitate cost sayings without such drastic cuts to the base rates of existing employees, but the union had little appetite for alternatives along these lines. Indeed, the union asserts that when these matters were raised the company was merely shifting position in order to avoid a collective agreement, and that in the case of proposed changes to the "manning" schedule the issue was simply too important an item to a printing trades union for the company to raise it in the latter stages of bargaining.
- 40. On June 30, 1989 the old agreement expired. On August 15th, 1989 the Minister of Labour advised the parties that he did not consider it desirable to appoint a conciliation board. On August 28th, the union took a strike vote. By early September the employees were in a lawful position to strike.
- With the expiry of the statutory freeze (see section 79 of the Act), the company was entitled to unilaterally implement changes in the employees' terms and conditions of employment. But there was no immediate strike, and for the time being, the employees were paid on the same basis as before. Mr. Slopen testified that, at that point, he was still confident that an agreement could be negotiated in the next few weeks without a work stoppage, and he was reluctant to precipitate a strike or generate employee ill will by imposing wage cuts even though he was legally entitled to do so. Nor did he think it appropriate at that stage to unilaterally impose the company's

other proposals, because those items were still the subject of bargaining, and he did not think that the ultimate settlement would necessarily mirror the company's current bargaining position. Mr. Slopen still expected that a timely inspection of the company's financial statements would temper the union's position, and the company was not particular about how the concessions were structured, so long as the result was a reduction in labour costs.

- 42. The company showed no such reluctance with respect to its other employees that is the majority of its work force who were not represented by a trade union or were part of the management team. During the period that the union was at the bargaining table, there have been layoffs, staff reductions, unilateral changes in compensation, the elimination of senior managers who were not performing to Mr. Olde's or Mr. Slopen's expectations, vigorous efforts to weed out unreliable accounts and attract new customers, and some experimentation with the employee complement to achieve the optimum mix of brokers, sales staff, estimators and so on.
- 43. Ironically, one of the casualties was Kai Friis, the general manager who joined the company in March of 1989, and accompanied Jeffrey Slopen at the bargaining table. Mr. Friis was ultimately discharged in August 1990, for reasons which may yet be subject to litigation elsewhere and are not here relevant.
- Mr. Friis was called as a witness by both parties to this proceeding, but, on balance we 44. do not think that his evidence makes the case for either one or significantly contributes to the general picture. In particular, we attach little weight to the "new details", and opinions he was disposed to reveal when he was called as a "surprise witness" (by the union) to give evidence a second time - after his discharge and while he was contemplating his own litigation against the company. We attach no weight at all to his submission that, in his opinion, the company was not prepared to sign any collective agreement - even one involving significant concessions. Mr. Friis' testimony is simply too self-serving on this point to be accorded much weight, and in cross-examination he indicated that he really did not know what Mr. Slopen would have done if the union had shown a willingness to make the significant concessions which the company was seeking. We also note that Mr. Friis testified that his former testimony was the truth, he had no new facts to add, and that in framing his earlier answers he had been careful not to implicate anyone. When asked about his own prospective wrongful dismissal action, Mr. Friis was totally evasive and equivocal. There was no admission of perjury or other startling revelation which the union had earlier asserted when it sought to call Mr. Friis "in reply to himself". On the contrary, the "new evidence" added little to what had earlier been said, other than to demonstrate enough bending in the direction of his own personal interest to raise doubts about the reliability of his testimony in general. We prefer the evidence of Mr. Slopen wherever it is in conflict with that of Mr. Friis.
- On or about September 1, 1989, Mr. Olde called a meeting of employees and gave a long and somewhat rambling address outlining his concerns about the company's losses and his hopes for the future. This address touched upon a variety of topics including the course of bargaining, and was accompanied by a document (exhibit 4) entitled "Employment Policies" which outlined a number of changes which the employer proposed to make effective the following week. These changes included a forty-hour work week, time and a half for overtime in excess of forty hours and double time for Sundays and holidays, the elimination of a cost of living increase, and a vague limitation on the existing vacation policy. In effect, the company was unilaterally implementing some of the terms which it had sought to achieve at the bargaining table as it was entitled to do at the expiry of the statutory freeze. However, this document contains the following express caveat:

The foregoing shall be effective until such time as the company and the union enter into a new collective agreement.

There is nothing new here except for the reference to "profit-sharing" which in fact was never later pursued.

- About a week later, the company issued a "policy manual" (Exhibit 5) which was given to some bargaining unit employees upon their request but which is expressly labelled: "FOR NON-BARGAINING PERSONNEL ONLY ... DRAFT COPY ONLY". With the exception of "profit-sharing" which was described in evidence as an item the employer hoped to generalize to all employees if the union was interested, these conditions were not offered to the bargaining unit employees in exchange for, or instead of those offered to the union, nor was there any bargaining directly with the employees. The new terms in Exhibit 4 were applicable to bargaining unit employees and encompassed some of the items for which the company had pressed at the bargaining table and mentioned a profit-sharing plan which would be implemented some time in the future, but these terms, unilaterally imposed, were not the broader concessions which the company expected to incorporate into a collective agreement. They were an interim measure which expressly anticipated the continuation of the bargaining.
- The employees did not welcome any of these changes. They had earlier speculated that the "non-bargaining unit policy" might signal the terms that would be available to them if they abandoned the union, and they expected these terms to be more favourable than those offered to the union. But in the result, they did not find them to be at all desirable and the evidence did not bear out their speculation. Thus, while the policy manual was the focus of considerable attention in the course of this litigation, it has never been a formal offer to the trade union, or the bargaining unit employees, and there is not the slightest indication that the union would ever be content to settle an agreement on those terms. It bears little resemblance to the previous collective agreement, contains few guarantees with respect to wages, working conditions, work rules or job security and includes no enforceable guarantees or protections against unilateral employer action. That is why the employees did not find it attractive.
- 48. Profit-sharing was not an item which the company had raised at the bargaining table either, because it reasoned, (correctly as it turned out), that since there had been no profits, only losses, the union was likely to regard such proposal as an empty gesture. During the course of this litigation, however, company witnesses were repeatedly pressed to explain why they were offering alleged advantages to non-bargaining unit employees that they appeared to be unwilling to offer to the union. Mr. Slopen indicated that profit-sharing was an Olde idea which had really never entered the calculation for bargaining unit employees and the reference to it was one of several errors which appeared in the documents issued at that time; however, when in the course of conducting its case before the Board the union indicated an apparent interest in profit-sharing, the company promptly extended the offer to negotiate about that. It was just as promptly rejected. As in the case of the policy manual, there was never any interest in the matter or effort by the union to raise this issue at the bargaining table. It was mentioned only in the context of this case, in an effort to show that the company was bargaining with individual workers, or offering them favourable terms to abandon the union. It was not.
- 49. On September 11th, on the eve of the strike, Mr. Oliver appeared on the company's premises during working hours, and held a "study session" with the employees. Mr. Oliver arrived without notice and was accompanied by both a solicitor and a reporter from a local newspaper. The company was disturbed about the unexpected work stoppage and the presence of the reporter.
- 50. During the course of this study session (or shortly thereafter) Mr. Oliver called Mr. Slopen to inquire about whether the policy manual was an offer to the union. Mr. Oliver had asked Mr. Friis about that, but Friis had, in turn, directed the inquiry to Mr. Slopen who was the compa-

ny's spokesman. Mr. Slopen replied that the "non-bargaining unit" policy manual, as its cover indicates, is not directed to the trade union and that the terms and conditions of employment for bargaining unit employees would be established through the process of collective bargaining. It was Mr. Slopen who decided what the company's position would be; and we mention this incident only because that has been the company's position throughout, while the union has claimed that Mr. Olde has been in the background orchestrating the company's positions. He has not; and for significant periods of time, he was out of the country attending to his various business interests. Nor did Mr. Slopen need any instruction or direction about the concessions he thought were necessary and attainable.

- From the expiry of the statutory freeze in August 1989 up to the commencement of the 51. strike in mid-September, the company invited employees to continue to work and told them that, if they did so, their wage rates would be maintained: that is, insofar as wages were concerned, the company would maintain the status quo for existing bargaining unit members pending negotiation of the new collective agreement. The company maintained that position even after they went on strike. But this was never an offer to maintain the status quo in its entirety, and the company did not do so. As time passed, the company unilaterally implemented a number of changes in the standard hours of work, overtime premiums and vacation scheduling, and hired new employees at rates lower than those paid to former members of the bargaining unit (a position the union had rejected). Existing bargaining unit employees maintained their previous wage rates, but new hires did not necessarily get the rate stipulated in the old agreement. The company also stopped applying the "manning" rules in the former collective agreement. Those rules had specified the number of employees that had to be assigned to each machine, and limited the employer's ability to allocate, schedule, or re-assign workers in the manner it considered most efficient. In the company's opinion, these work rules were never necessary nor welcome, and this opinion was strengthened during the strike when it discovered that it was able to operate its equipment with fewer or different employees than those stipulated in the collective agreement, and said by the union to be absolutely essential.
- It was this discovery which later prompted the company to suggest that its position on wage concessions might be modified if the union were prepared to agree to revise the established work rules. The union refused. Counsel told the Board that for a craft union in the printing industry, those work rules were a critical part of the agreement from which the union was unwilling to depart. The company's proposal was characterized as a serious threat to the employees' job security, and an effort to derail bargaining by raising issues that had not previously been central to the employer's bargaining position. Mr. Slopen testified that he thought that was what bargaining was all about: innovative efforts to reach accommodation, and the exploration of new ways to meet the parties' concerns. Mr. Slopen testified that relief from restrictive work rules was a cost-saving measure that would allow the company to moderate its demand for wage concessions; however, when the union refused to negotiate along these lines, the company maintained its formula for reducing costs through direct wage concessions.
- The union's efforts to preserve the status quo, and debates about what that meant, had other ramifications as the bargaining process and the litigation became increasingly intertwined. As we have already mentioned, the company has never been prepared to maintain the status quo on wages and benefits, and while its proposals for change have been diverse, none of them can be considered minor. It has been somewhat flexible about the mix of concessions, but has never retreated from its ultimate objective; moreover, the union's step by step retreat from its initial wage demand to the alleged "status quo" wage position was never accorded the significance that the union attributed to it. From the company's perspective, much of the union's "movement" was entirely illusory or inconsequential, since it was measured from an artificial and unrealistic plateau. From the start-

ing point of a significant increase in wages and benefits, the union had given itself lots of room for "movement" without ever getting close to a position that the company considered "in the ball park", and Mr. Slopen testified that he was not inclined to "bargain with himself".

- In the company's frame of reference, the status quo was different from the union's opening positions but was not, by itself, the basis for agreement. The company had agreed in 1987 to maintain the status quo, and had still lost almost a million dollars. The company wanted to cut costs not maintain the status quo. And, as it turned out, "status quo wages" was not something which even the union ultimately accepted unequivocally.
- In the union's opening statement at the commencement of this case, counsel indicated that the union would be prepared to accept status quo wages, and much later, in argument, he contended that in the absence of bad faith bargaining, the parties would have achieved a collective agreement on that basis together, perhaps, with minor concessions in other areas. But this "status quo wage" position had never been put to or pursued with the company in the months preceding the filing of this complaint, and when the union did eventually submit that position, it was linked to a one-year term of operation (which the company did not want) and little significant change in other areas. Despite counsel's opening statement, the union's official position at the beginning of the case was a demand for a significant wage increase, and it was not until months later that this demand was modified, and then only for the first year. Meanwhile, the company continued to maintain that it had already extended the agreement during the last round of bargaining and had subsequently experienced significant financial losses. The company wanted reductions, not the status quo, and, as it turned out, the union wanted wage increases beyond the first year.
- In cross-examination, counsel for the union sought to explore with individual members of the company's bargaining team (or, in Mr. Olde's case, the owner) items which might form the basis of a collective agreement. These questions were arguably relevant to the union's plea that the company was not interested in any agreement on any terms at all, and on that theory, the union was entitled to test the employer's willingness to settle, and to try to establish through cross-examination that there was really no position which the company was prepared to seriously consider. But there are problems with this process - particularly if these items had not been raised, or raised in the same form at the bargaining table, or the union's actual bargaining posture was not the same as it was portraved before the Board. Another problem lies in the "polycentric" nature of bargaining, the ambiguity inherent in the parties' bargaining positions, and the fact that different members of the management team are being asked to speculate about the possible basis for settlement in the highly artificial arena of a Board hearing. Mr. Friis, for example, was asked a number of "what if" questions, and counsel at one stage prefaced his reference to the union's "official position" with the comment "assume that's gone". Mr. Olde was not even at the bargaining table, and his testimony demonstrated that, far from pulling the strings in the background, he had little appreciation of the issues or the debates, because he had delegated responsibility for the bargaining to Mr. Slopen. Thus, while the union is entitled to proceed in this way, litigation is not a reliable substitute for bargaining, and the evidence adduced is not a helpful indication of the settlement point - especially if the union is not prepared to make the concessions hinted at in cross-examination. (The "profit-sharing" debate is an example of this.)
- 57. In his evidence before the Board, Mr. Olde indicated that he might be prepared to agree to "status quo wages", but he also said that this was only "part of the package", possibly linked with profit-sharing, and for a period which was unspecified. Nevertheless, in view of these developments at the Board (and in particular the way in which the union had framed its questions to Mr. Olde), the company indicated that it would consider a concrete union proposal along these lines. The company anticipated that it would, at the very least, receive a new trade union offer

framed in terms of "status quo wages" which, if linked to a longer term agreement, would be much closer to what the company considered to be an appropriate settlement point than the union had previously advanced.

- But that is not the position that the union took. Instead, in its next offer, the union demanded a two per cent wage *increase* in the first year retroactive to the expiry of the old agreement, and the union was not initially amenable to any extended term. It was not until some months later, on February 16th, 1990 that the union proposed status quo wages for the first year. In that meeting (attended by the union's solicitor who took notes) the company reiterated its various concerns, stressed its financial losses and need for a three year agreement and indicated its willingness to look at various provisions of the agreement provided there were some wage concessions. Mr. Slopen said "I need at least a one per cent take back". The union did not agree.
- It will be seen, therefore, that despite its posture before the Board, the union did not agree to wage concessions and did not adopt a "status quo wage" position of the kind which might have induced a collective agreement even though it had indicated its willingness to do so. And its "status quo" was clearly only for the first year of the agreement. By August 1990, after much skirmishing about what Mr. Olde "really meant", and the significance of the company's losses for bargaining, the union was proposing a three-year agreement, with status quo wages for the first year (which had by then expired), a three per cent increase in the second year and a five per cent increase in the third year. By the end of this litigation, many months later, and despite more debate about work rules and the purported acceptability of "status quo wages", the union was still demanding a three per cent increase in the second year of the agreement and a five per cent increase in the third. Meanwhile, the company was prepared to consider "0-0-3" in conjunction with certain changes in other areas and indicated that it was willing to move further if there were concessions on work rules. In summary, the status quo of the old agreement - even on wages - has not been the position of either the union or the company, and the status quo of the old agreement has not been the basis upon which the company has actually operated its business since early September 1989. But debates about what was said or done at the Board, or what was meant or intended, did much to muddy the waters and deflect the parties from the process of bargaining.
- The Board heard quite a lot of evidence about employer actions which, the union concedes, appear innocent (albeit obdurate) when viewed in isolation, however, the union argues that, when viewed cumulatively, these actions point to the conclusion that the company was really trying to avoid a collective agreement. Among them was the company's decision not to immediately implement wage cuts at the expiry of the statutory freeze, but rather to maintain wage rates for bargaining unit employees while the negotiation process was on-going. The company adhered to that decision even after the employees went on strike, so that employees who decided not to go on strike or later deserted the picket line maintained the base rates that they had earned before. At the same time, the company was seeking wage concessions at the bargaining table.
- 61. The union contends that this was offering the employees a "Hobson's choice": stick with the company and maintain the status quo wage rates, or support the strike and face concessions. The union submits that the employer was offering better terms to the deserters, than it was prepared to offer to those who continued to support the strike.
- 62. There are several difficulties with this submission. In the first place, it suggests that in order to avoid an unfair labour practice allegation, an employer should unilaterally implement its last offer, immediately upon the expiry of the statutory freeze, lest it later be said that its demand for concessions is illegitimate. That is hardly a proposition likely to foster amicable collective bargaining. Obviously, the Board must carefully scrutinize situations where it is said that an employer,

pleading poverty, seems to be prepared to pay more to employees who choose to remain at work than it would take to settle the strike, but abandoning the strike is not the same as abandoning the union, and those who remain at work will always be better off, in the short run, than those who go on strike. We might also note that section 73 of the Act specifically contemplates that "the deserters" have a right to reinstatement without discrimination by reason of their exercising the right to strike, on "such terms as the employer and employee may agree upon" - in this case, the wages that they had earned before. We do not think we should readily conclude that it was illegal for the employer to pay some of its workers what they were earning before, but it would be satisfactory if it paid them less.

- More fundamentally, however, the union's argument ignores the other elements of the company's position, depreciates the real value which the union itself puts upon non-wage items and ignores the real costs to the company associated with the old collective agreement terms. Not only has the company, in fact, unilaterally imposed lower premium rates and new hires are paid lower base rates, but, in addition, the company is now entirely free from the scheduling, assignment, and work rules in the prior agreement. When these items are factored into the equation, the status quo on wages looks much less attractive or so the union must have calculated when it called the strike initially and later refused to negotiate about work rules or staffing schedules, and so the employees must have believed when they continued to support the strike.
- It is quite misleading to suggest that the employer is offering the employees a "better deal" than it is prepared to offer to the union, when there is no indication whatsoever that the union would ever be inclined to incorporate that status quo - the prevailing reality - into a collective agreement. In fact, all indications are that the union is not prepared to agree to an extended wage freeze with major concessions in other areas including work rules, while the company is prepared to moderate its demand for wage cuts, in return for more flexibility of the kind it now enjoys without the work rules, scheduling restrictions, and premium payments set out in the old collective agreement. The union sets up a false dichotomy: abandon the union and maintain the status quo; or stick with the union and face concessions. In either case, the company is demanding that its employees make concessions, and if it has the bargaining power it will be able to obtain them. The actual status quo prevailing today is not the old collective agreement, it is not a better deal designed to wean employees away from the union, and it is not an arrangement which the union wants to embody in a collective agreement. It is sophistry to suggest that the company is offering more to the employees if they abandon the union. It is not. What it is saying is that cost-cutting is essential, and if wage cuts are to be moderated or avoided, cost savings must be achieved elsewhere.
- 65. It is appropriate to reiterate what the right to strike is about. Strikers are faced with the option of agreeing to the company's last offer however mediocre or pressing for something better; and if they choose the latter course, they face wage losses which may never be fully recovered. Similarly, if the company resists the union's demands, it faces the threat of disruption and economic losses which may well exceed the cost of agreeing to the union's position or some more moderate variation. In both cases it is the threat of economic loss and the ability to inflict or sustain it, that prompts the parties to settle, and determines the ultimate settlement point. The fact is, collective bargaining is sometimes a contest of economic power, only partially moderated by polite manners, statistics, and various degrees of responsiveness to public opinion, moral principle or a "sense of responsibility". The importance and legitimacy of bargaining power cannot be minimized; moreover, the Board must recognize that its own processes may be used by a party for tactical purposes or to impose cost on the other side. Of course, if an employer is offering more to employees than it is prepared to offer the union, or while pleading economic hardship is prepared to spend more than it would cost to settle the agreement, there might well be grounds to suspect its motives

- although even here one must be careful because goals must be assessed against "the long run" and both parties have objectives or principles (following the "pattern" or avoiding bad precedents, for example) to which it is difficult to attach an economic value. But those are not the facts of this case.
- 66. Similar observations can be made about the company's decision shortly before the strike, to promote into management positions persons who were previously members of the bargaining unit. The union contends that, in conjunction with new hiring, this indicates a desire to undermine the bargaining unit. The evidence demonstrates, however, that the two employees in question did in fact assume a broader range responsibilities including managerial functions, serious weaknesses in line management had been evident for some time, and the promotions had been discussed long before they were implemented. The company delayed implementation of these promotions until after the expiry of the statutory freeze because it was clearly creating a new managerial structure and it wanted to avoid unfair labour practice allegations. The union witnesses concede that, apart from timing, there is nothing suspicious about these promotions. They are also consistent with the company's efforts to establish more effective "line management" with tighter control of the production process. Managers hired "off the street" had proven singularly ineffective, and it was natural for the company to turn to skilled tradesmen who were familiar with the work processes. In the circumstances, there is nothing sinister in that.
- 67. The hiring efforts about which the union complains began long before the strike, were necessary to replace workers who had been fired, and were consistent with the company's long run objective to recruit crews for, and implement, a multi-shift operation. One of the company's objectives was to keep the Web press in more continuous operation with a work schedule that did not generate so much overtime or payment at premium rates. And, of course, it is lawful for the company to try to continue to operate during a strike. There is no evidence that the company has employed professional strike breakers.
- The evidence establishes that, at least in the early stages of the dispute, there was some talk among the employees about "decertifying" the trade union and some speculation about their prospects of dealing with the company on their own. But we cannot conclude that these notions originated with the company, and when they were raised, the company properly told employees that they would have to seek their own independent legal advice. We do not put much weight on the telephone conversations with Mr. Friis, that the union secretly taped, or the comments attributed to him when he was inviting employees to stay at work rather than go on strike. Mr. Friis' comments where ambiguous, must be viewed in a context which includes earlier discussions on the plant floor and a phone call which was not taped, and reflect Mr. Friis' inclination (evident in his testimony) to tell people what they wanted to hear.
- 69. Nor are we inclined to attach much significance to a document issued a couple of weeks after the strike began, indicating that the employees had been terminated. It is clear that it was only the employees' benefits which were actually being terminated, and the company quickly issued a correction notice to that effect, together with a press release. The unemployment insurance records issued contemporaneously with the initial notice, quite clearly indicate that the employees are going on strike, and we are satisfied that the notice was simply a mistake. It is fairly common for the union or employees to pick up the cost of benefits while employees are on strike, and that is what happened here. The press release was necessary because of union allegations to the press that the company was acting illegally.
- 70. However, the secret taping, the making of transcripts of bargaining, the filing of this complaint the day before an important mediation session, and the presence of the union's solicitors

at the bargaining table all suggest that almost from the outset, the union's focus shifted from the bargaining table to litigation, and making its case before the Board. That was also evident in the way it conducted its case, bargaining through the Board, and making concessions (for example, agreeing to look at the company's books) in accordance with its current assessment of how well it was doing in making its case. According to Mr. Slopen, real progress was being made until the union received a favourable arbitration award, at which point the union's appetite for bargaining suddenly cooled; and for several months when the union hoped that Mr. Friis - something of a surprise witness - would give damaging evidence, the union refused to meet at all, despite the company's several requests. The Board became the forum for raising new positions and cross-examination the means of exploring them. In the circumstances, it is difficult to resist the conclusion (urged upon us by the company) that the Board's processes became a substitute for bargaining and compromise. It is not unusual for a weak union to use litigation as a lever, to inflict costs upon an employer or induce concessions which would not otherwise be forthcoming. However, in the circumstances, we are mindful of the warning raised by Professor Cox many years ago:

"There is also the danger that the regulation of collective bargaining procedures may cause negotiators to bargain with a view toward making the strongest record for NLRB scrutiny. The report of the *Truitt* negotiations bears ample evidence of the jockeying of lawyers. Hammering out a labour agreement requires all the negotiator's skill and attention. To divert them from the main task by putting a value on building up or defeating an unfair labour practice case, diminishes the likelihood that the negotiations will be successful".

[emphasis added]

- Having considered the totality of the evidence, we are satisfied that the company's conduct and bargaining posture do not contravene the Act. The company bargained hard, but we cannot say that its position at the bargaining table was "so unreasonable or devoid of apparent business justification as to evidence a desire to avoid any collective agreement altogether" to borrow the words of the Board in Canada Trustco, supra. The company's losses were real, and, for a business of this size, significant. The company was determined to reverse its financial fortunes through a variety of means including extracting concessions from its employees. In the case of the nonunion employees, these changes were implemented unilaterally; and in the case of the bargaining unit employees, they were pressed at the bargaining table. An employer is entitled to demand concessions or changes to the prevailing terms of agreement - even significant ones - without thereby acting illegally, and whether it achieves those objectives or not will depend upon its bargaining power. It does does not matter whether this Board thinks the company is being fair, wise, grasping or bloody-minded, or whether in our view, the union is being reasonable or unrealistic. The Board's role under section 15 is not that of interest arbitrator, prescribing the terms that in our opinion are most appropriate to the parties' situation, and designating "illegal" those positions which deviate from that opinion. To put the matter another way: the Board is not concerned about the particular content or fairness of the bargaining, so long as the parties really are prepared to sign a collective agreement.
- 72. In the instant case, we are satisfied that this company *is* prepared to sign a collective agreement provided that it contains economic concessions and cost-saving measures which, in the result, the union considers unacceptable. That bargaining stance is not a breach of section 15 of the Act, and while the ultimate bargain or the union's bargaining strategy may result in a reduction in the union's prestige and prerogatives, we do not think that there has been a breach of section 64. We repeat: in our opinion the employer's sole motivation and bargaining objective was to achieve an agreement with substantial concessions not to eliminate the trade union.

73. For the foregoing reasons, this complaint is dismissed.

DECISION OF BOARD MEMBER B. L. ARMSTRONG; October 18, 1991

- 1. It is my opinion from a review of the totality of evidence, that the employer had no intention of reaching an agreement with the trade union. From the outset it was determined to frustrate, and eventually destroy the union.
- 2. The obligation to bargain under section 15 of the Ontario Labour Relations Act is clear, and states:
 - 15. The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.
- There is a clear obligation on both parties, the employer and the trade union, to enter into serious discussions with the intent of entering into a collective agreement. It was difficult in my review of the evidence for the trade union to determine who was in charge: Mr. Olde, the owner or his agent Mr. Slopen. Non-union employees were offered status quo along with profit sharing. On the other hand the bargaining unit employees were asked to take a reduction in wages of $7\frac{1}{2}$ %, a reduction in overtime pay with an addition in the working hours. The bargaining unit employees were called the night before the legal strike was to commence, were encouraged to come into work, and were told they would continue to receive status quo wages. Some of the bargaining unit members were promoted from the unit to management positions. These actions taken together eroded and frustrated members of the trade union. They had to make a choice of accepting a reduction in wages or to continue in their support of their union by taking a reduction of $7\frac{1}{2}$ %. Clearly that is a case of bad faith bargaining and a deliberate attempt on the part of the employer to rid itself of this bargaining agent.

3032-89-OH Deborah Brown, Complainant v. Trelford Automobile Limited, Robert Trelford, Respondents

Damages - Health and Safety - Board earlier allowing complaint and remaining seized as to compensation - Parties unable to agree and matter brought back on for hearing - Board concluding that complainant made reasonable efforts to find work in mitigation of her losses - Board, however, making deduction from damages award for unexplained portion of delay in filing complaint with the Board - Board rejecting employer's argument that award should be reduced because employer is a small one and was not a conscious or flagrant violator of the Act

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members R. W. Pirrie and E. G. Theobald.

APPEARANCES: Linda Vannucci-Santini for the complainant; Edmund J. Stevens and Peter Trelford for the respondent

DECISION OF K. G. O'NEIL, VICE-CHAIR AND BOARD MEMBER E. G. THEOBALD: October 22, 1991

- 1. This is the continuation of a complaint under the *Occupational Health and Safety Act*. In its decision dated November 13, 1990, (now reported at [1990] OLRB Rep. Nov. 1155) the Board allowed the complaint and remained seized as to compensation. The parties were unable to agree as to the compensation owing and therefore the matter was brought back on for hearing.
- The complainant, Deborah Brown, gave evidence as to her efforts to secure employment in mitigation of her damages. She was terminated effective May 12, 1989. On May 17, 1989 she registered with the Canada Employment and Immigration Centre ("CEIC") as a secretary/receptionist or clerical worker in the Owen Sound, Chelsea and Tara areas. Owen Sound is twenty to twenty-five minutes from her home town, Tara, and Chelsea is about fifteen minutes away. She called the CEIC once a week after that and visited once or twice every two weeks. She checked the daily newspaper and responded to ads concerning receptionist or clerical work. She went to a variety of businesses personally, inquiring for work or dropping off a resume or application. In Owen Sound she recalled applying at the Grey Bruce Regional Health Centre, the Co-operators Insurance Agency and the CEIC itself. In Tara she asked for clerical work at a parts manufacturer as well as in insurance agencies. Other places she applied were the Bruce County Board of Education, a nursing home, a hospital and the Ontario Hydro sites at Douglas Point and Owen Sound. She had a vehicle available and had child care for her two children at any time of the day or night.
- 3. She found work in the Red Cross Homemaking service in Owen Sound on April 3, 1990 as a visiting homemaker. She was part-time when she began and the amount of work increased in the summer of 1990. She was available for and had asked for more hours than she was given. She has had no other income except UIC. Her claim stops at July 23, 1990, the date of the last hearing on the merits, when her hours began to be closer to full-time and she withdrew her claim for reinstatement.
- 4. On cross-examination it became clear that although Ms. Brown had experience in working as a bank teller she had not applied to banks. She was more interested in becoming a receptionist or doing clerical work which she thought was something that banks seldom required.
- 5. She was hired by the Red Cross at the end of March to start on April 3. This was not very long before her UIC benefits were to expire, but they had not yet expired. She first applied to Red Cross in January or February. She said that although she had worked in a nursing home she had not been aware of this Red Cross service until she met somebody who informed her about it in January of 1990. She said that although she had only mentioned one nursing home in direct examination she had put in phone calls to others but they were not accepting staff or applications. She did not apply at her former employer in Tara, a nursing home, because her paycheques had bounced there. Employer counsel named a number of health care institutions in the geographical area in which she was looking to which she had not applied. He also named a place that he said was hiring where she had not recently put in her resume. She had applied to several others he named.
- 6. Referring to Jacmorr Manufacturing Ltd., [1987] OLRB Rep. Aug. 1086 complainant's counsel argued that Ms. Brown had engaged in reasonable mitigation. She had made child care arrangements and had gone beyond what the complainant did in the Jacmorr case. We are asked to consider that in the area surrounding Owen Sound there are bound to be fewer opportunities than in a metropolitan area like Toronto and that most of the places that employer counsel named were ones to which she had applied. We were asked to consider her uncontradicted evidence that she asked for more hours at Red Cross. Furthermore, she travelled looking for work. She had a vehicle and accepted work outside her home town.

- 7. In argument the respondent suggests various reasons that the Board should not award full compensation. These were, in summary:
 - (a) Failure to apply at all the available work places in the area of her search, being too selective in her search. It was argued that her effort was not very great until her unemployment insurance was running out, and that the work she accepted was not what she had registered at CEIC for;
 - (b) She filed the complaint eleven months after the facts complained of. Counsel refers to *Tecumseh Products*, [1985] OLRB Rep. Jan. 123;
 - (c) The Board's finding that the employer also had legitimate concerns about her performance. Counsel characterized the Board's decision on liability as finding a large body of performance problems that would have justified discharge. Counsel asked the Board to send a message to those coming later as to the appropriate manner of dealing with these cases. He made the analogy that if the paint room incident was the straw that broke the camel's back, the camel was already very loaded. He suggested that compensation should be commensurate with the degree of contribution that the paint room incident made to the discharge. Counsel argued that the fair result would be to only give partial compensation because the violation of the Act was only part of the reason for discharge;
 - (d) Her receipt of unemployment insurance benefits. Employer counsel argues that because the employer is small it should benefit from the UIC "social safety net" and the award should be reduced by the amount of the unemployment insurance received.
 - (e) The employer was not a conscious or flagrant violator of the Act. As an example of the employer's non-flagrant attitude counsel mentions the fact that they never again asked her to perform the work again to which she objected. As well, it gave her several weeks notice of her termination.
 - (f) Section 24(7) of the Act should be applied because of the employer's legitimate concerns about the complainant's performance in a fashion that would reduce the compensation owing.
 - (g) There should be a distinction made between large and small employers in penalty. Employer counsel referred to any sums that might be awarded to the complainant as a penalty.
 - 8. In distinguishing *Jacmorr*, *supra*, the employer argues that Ms. Brown was more free of constraints than the complainant in *Jacmorr* and therefore it is reasonable that she should have made a greater effort than that made by the woman in *Jacmorr* in mitigation of damages.
 - 9. The complainant's calculations of damages include an increase in the following year. Counsel says that given the findings of the Board about her performance that that should not apply.

- 10. In reply, complainant's counsel argues that *Jacmorr* is not readily distinguishable and that neither UIC benefits nor the employer's ability to pay should be a factor in determining the award. Further she states there is no room for any application of section 24(7) as no finding of cause was made. She argues that the message should be consistent for large and small employers; if any part of the reason for discharge is in response to protected activity, it is contrary to law and compensation follows. Counsel also noted that UIC had already taken into account income received when calculating benefits.
- 11. As to the delay issue, counsel submits the complainant was not cross-examined on that point and she did not have information on her rights. Therefore it is submitted that no deduction should be made for delay in this matter.

Award of Compensation

- 12. In assessing damages following a finding of a breach of the Act, the Board attempts to put the complainant in the position that she would have been had the unlawful discharge not occurred. The purpose of these awards is compensatory and not punitive. They are not a penalty on the employer. The Board has no penal jurisdiction.
- Board places a responsibility on the employee concerned to mitigate the losses, but the onus of proof that an employee has failed to mitigate is on the employer. See, among others, *Bond Place Hotel*, [1983] OLRB Rep. Jan. 24. In this case we are of the view that, on balance, Ms. Brown made reasonable efforts to find work in mitigation of her losses. She registered with CEIC, checked with them on a regular basis, kept track of newspaper opportunities and spoke to friends and families about the possibilities of employment.
- She registered with CEIC for work equivalent to that which she had lost, i.e clerical work. The employer asks that any award be reduced because she did not register in the area in which she eventually found work, or areas in which she had previous employment, including health care and banking. It is true that there is a possibility that registering in these areas would have enhanced Ms. Brown's ability to get work sooner and at least to this extent it is true that Ms. Brown could have done more in mitigation of her wage loss. However, the question before us is not whether this was a perfect job search, but whether it was reasonable. There is nothing in the evidence that suggests that Ms. Brown's efforts were unreasonable. This is particularly true when one considers that the employer did not prove that there was any job that was available that Ms. Brown would likely have gotten, nor any evidence about what she would have earned in any such position. There was no evidence, for example, of the sort brought in P, iH iMJ, Wallbank Mfg. Company Ltd., [1980] OLRB Rep. Dec. 1797 that there were job opportunities in the employee's trade that he would likely have received if he had applied. Given these factors, in light of the fact that her overall efforts were reasonable, we see no reason to reduce the award on this aspect of the argument. See in this regard De Carlo Shoe Co., [1965] OLRB Rep. June 224 and Sutton Place Hotel, [1980] OLRB Rep. Aug. 1250.
- 15. We turn next to the delay in filing the complaint. The Board's approach to delay has been explained most frequently in its decisions on requests to dismiss for undue delay in filing complaints. The Board has explained on numerous occasions that it does not take a mechanical approach to delay. If the delay is extreme, the complaint may be dismissed. If the complaint proceeds, and is successful, the Board may take any unreasonable delay into account when assessing compensation. See, among others, *Hayes Dana Limited*, [1968] OLRB Rep. April 89; *Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420; *Marshall-Globe Canada Ltd.*, [1982] Jan. 113; *George Hinkson*, [1987] OLRB Rep. Oct. 1246; *Roma Auto Metal Iron Limited*, [1969] OLRB Rep. Oct. 885; *Decor Wood Specialties Limited*, [1974] OLRB Rep. March 136; *Ernie's*

Signs Limited, [1976] OLRB Rep. August 404. Here, there was no request to dismiss but the matter was raised in the context of argument on the quantum of compensation.

- 16. As the reported cases indicate, the Board has taken into account whether the delay is explained and such matters as lost settlement opportunities, any prejudice to the other party, cessation of union representation and whether the complainant was letting time run in order to increase a claim. It has acknowledged that some time must be allowed to consult and to ascertain the strength and weakness of a case. In a unionised context, in *Ernie's Signs Limited*, supra, the Board accepted that the principle of mitigation extends to the reasonableness of the union's efforts to redress the alleged wrongdoing. In *Sonic Transport Systems Limited*, [1981] OLRB Rep. Oct. 1483 the standard applied was when would the complaint have been filed if counsel and the client had proceeded with due diligence. Each case turns on its facts.
- 17. Given the fact that the employer did not argue that the complaint should be dismissed, its argument on delay is in effect an argument that Ms. Brown failed to mitigate her damages. Its import is that her damages are higher than they ought to be because of an avoidable reason: if she had complained earlier, the matter would likely have been heard and resolved earlier, with a shorter period during which damages would have accumulated. Whether or not to complain is a matter which was in Ms. Brown's control. The employer is essentially saying that in delaying the complaint Ms. Brown failed to act reasonably in mitigation of her damages. The idea that delay is an aspect of mitigation was accepted by the Board in *Ernie's Signs Limited*, *supra*. The onus of proof that a complainant has not acted reasonably in mitigation of damages is on the employer.
- Any deduction for delay is resisted by complainant's counsel on the basis that the complainant was not cross-examined on her evidence about delay. There was no obligation to cross-examine on that evidence in the circumstances of this case. Failure to cross-examine does not mean that the evidence is not relevant nor that the party electing not to cross-examine on certain testimony will not place any reliance upon it. However, the fact that the onus of proof on the question of the reasonability of the efforts to mitigate is on the employer will mean that failure to develop the evidence in cross-examination is at that party's own risk.
- The evidence we have on the delay issue is in the complainant's direct examination in the original hearing. Most specifically, complainant's counsel asked her client when she had found out that she had the right to file a complaint with the Board. The complainant's response was that first of all she had difficulty in obtaining the inspector's report and then she found that she could file a report (by which we infer she meant a complaint), through the Minister of Labour in Kitchener. Further, she said she did not get the inspector's report until mid-November 1989. In another portion of her evidence, the complainant said she knew she could have called an inspector prior to May 12, 1989, the effective date of her discharge, having learned this from one of her husband's co-workers. There were apparently three visits by Ministry personnel to the employer: a May 24, 1989 inspection done in response to an anonymous complaint, a hygiene field visit on September 29, 1989, and a follow-up inspection on November 16, 1989. The complaint is dated March 8, 1990.
- Thus, the period of time between the effective date of discharge and the receipt of the inspector's report (or reports the evidence is unclear which) is approximately six months. Exactly when Ms. Brown learned of her right to file a complaint is unclear, although it was apparently at a different time from her learning of her right to call the inspector whether before or after we do not know. She seems to have been under the impression that she needed the inspector's report before she could proceed, although this was incorrect. The period after mid-November, 1989, when she received the report, and the date of the complaint, March 8, 1990, is completely unexplained.

- The portion of delay until mid-November is explained by waiting for the inspector's report and Ms. Brown's ignorance of her rights. The evidence does not establish that Ms. Brown was involved in the calling of the inspector, although given the timing, it is highly likely that the anonymous complaint was at least triggered by the facts of her case, if not made by her. She must have known about it, or waiting for the report is inexplicable. Waiting for the inspector's report was unnecessary, since it was not a pre-requisite to filing a complaint, and as it turns out, did not assist in establishing the facts pertinent to the complaint. The latter fact is not something that the complainant could have known prior to receipt of the report or reports. There is no indication that Ms. Brown was delaying so as to increase her damages.
- The question before us is whether the delay was unreasonable so as to deprive the complainant of the compensation that would otherwise flow in the circumstances of this case. The proposition that waiting for the inspector's report was unreasonable was something that was never put to Ms. Brown in evidence, and thus we do not have evidence directed at this point. Although waiting indefinitely for any reason, including an inspector's report, is not something the Board can condone, the evidence before us does not establish that waiting until the time of the issuance of the last report was unreasonable. In other situations, or on other evidence, it might well be found to be unreasonable to wait so long for an inspector's report before filing a complaint. Given the onus of proof on this aspect, on the evidence before us, we have determined that the delay until mid-November should not weigh against Ms. Brown in the calculation of damages.
- We also note that a consideration present in this case that was not present in any of the reported cases is that neither party was aware of its rights and obligations under the OHSA. Any consideration of lost settlement opportunities or possible prejudice (which was not argued in this case) must be viewed in light of the fact that the ignorance of both parties contributed to the fact that the matter was not handled as the legislation contemplated at the time of the incident. If either party had been familiar with the legislation, it is likely that the paint room incident would have been handled quite differently, with the possibility of Ministry involvement earlier on. Ms. Brown might then have become aware of her right to file a complaint earlier, or the matter might have been sorted out short of her discharge. In any event, the likelihood that the delay would not have occurred would have increased.
- We have considered the fact that the delay is substantial, and approaches the length of time at which complaints have been dismissed for excessive delay. As the Board stated in *Tecumseh Products*, *supra*., the Board's approach to delay as set out in a variety of cases under *The Labour Relations Act* is also applicable to matters under *The Occupational Health and Safety Act*. In that case the Board remarked that expeditious resolution of alleged violations of health and safety legislation is even more desirable. Further, the period of time between the receipt of the inspector's report and the signing of the complaint is completely unexplained. In all the circumstances of this case, we have determined that an amount should be deducted from damages which would otherwise flow which is representative of the unexplained portion of the delay, from mid-November, 1989 until March 8, 1990, a period of approximately 16 weeks. Compensation would otherwise have been payable for 62 weeks; thus it will be calculated on the basis of 46 weeks.
- As noted above, respondent's counsel also argued that the Board found his client had legitimate grounds for dismissal of the complainant, and that this also warranted a reduction in compensation. However, the Board did not find that there were grounds for dismissal. This question was not before the Board and was not addressed by the Board. What the Board did find was that there was legitimate ground for the employer's concern about Ms. Brown's performance and that the possibility of terminating her had been discussed. However, the Board wrote at paragraph 25 in its decision on the merits that the employer had many options to deal with its dissatisfaction,

including discharge, and that none of those options had been exercised before the paint room incident. In this situation we do not find it appropriate to make any deduction for poor performance or any possibility of discharge. We have found that the discharge was unlawful. We are simply unable to know, in the circumstances, whether or not the employer would have ever put the matter of Ms. Brown's performance back on the table for discussion if the paint room incident had not occurred. The dissatisfaction had gone on for a significant length of time with no action from the employer. This is not a case such as *FAG Bearings Ltd.*, [1978] OLRB Rep. Jan. 76 where the evidence established that the employer had a history of giving disciplinary suspensions and that the unsatisfactory conduct in evidence would have warranted them. Nor is it a case like *Art Shoppe*, [1988] OLRB Rep. Aug. 729 or *Bo Ramjit*, [1990] OLRB Rep. Aug. 874, where the Board was satisfied that the employee was intending to leave shortly anyway and computed damages accordingly. Our case is more similar to *Home Bread Bakery*, [1972] OLRB Rep. May 537, where despite a less than satisfactory work record, full compensation was awarded upon finding a breach of the *Act*.

- The employer also asks that it be given the benefit of the "social safety net", the unemployment insurance benefits the employee received, and that the amount received be deducted from the compensation order. The request did not include any indication that the employer would remit the amount to UIC. We cannot grant this request. The law is clear that whatever the disposition of the amounts received from unemployment insurance, the employer cannot retain the equivalent sum. Sections 51 and 52 of the *Unemployment Insurance Act* are clear on that, as is the jurisprudence on the subject.
- What is less clear in the jurisprudence is whether damages for unjust or unlawful dismissal are remuneration within the meaning of the Unemployment Insurance Act and what their disposition ought to be. See, for instance, Re Town of Kentville and Kentville Police Association, [1983] 6 L.A.C. (3d) 377 and its reference to the case of Smith v. World-wide Church of God et al., (1980), 39 N.S.R. (2d) 430 and Peck v. Levesque Plywood Limited (1979), 105 D.L.R. (3d) 520 and Re Mohawk College of Applied Arts and Technology and Ontario Public Service Employees' Union (1982), 5 L.A.C. (3d) 237. See also the unreported decision Canadian Pacific Limited and Brotherhood of Locomotive Engineers, dated March 14, 1990, in which arbitrator M. J. Picher considered the lower court's decision in Ratych v. Bloomer (1987) 16th C.C.E.L. 245 in this respect. See also the consideration of the Supreme Court of Canada's May 3, 1990 decision in Ratych, now reported at [1990] 1 S.C.R. 940 in the unreported decision in Monette v. Braund, Ontario Court of Justice dated Oct. 24, 1990. In the latter decision, Mr. Justice Cosgrove concluded that UIC payments should not be deducted from an award of damages for loss of wages as employer wages would have been. In any event the only request before us was to have the employer's liability reduced by an amount equivalent to these benefits. It is therefore unnecessary to decide whether or not an amount equivalent to the UIC benefits should be deducted on any other basis, particularly in light of the fact that the parties did not argue any of the law on the subject, which as we have said, does not indicate a clear result in the circumstances of this case. As well, we have not awarded compensation for the full period of receipt of UIC. If Ms. Brown has a repayment obligation to the Unemployment Insurance Commission, that is a matter to be resolved between her and the Commission.
- 28. The employer also asked that the award be reduced because the employer was not a conscious or flagrant violator of the Act. Since the award is compensatory and not penal in nature this is clearly not an appropriate basis for reduction.
- 29. The employer also asked us to apply section 24(7). Section 24(7) reads as follows:

Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by

an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

However, as noted above, the Board did not determine that the worker had been discharged or otherwise disciplined for cause. Thus, the section has no application in the circumstances of this case. More generally, the penalty referred to in that section is a penalty on the employee, not the employer. As we have said above the Board has no penal jurisdiction for infractions of the Act and the award of compensation is not a penalty but a "make whole order".

- 30. We also find no merit in counsel's request that we reduce the complainant's compensation because the employer is a small one. We were made aware of no basis in the law generally or the *Act* itself to reduce a "make whole" order because the employer is small. The Act does not make a distinction between small and large employers when establishing obligations as to work refusals, and we see no legitimate basis for doing so in quantifying the compensation owed to the complainant by the respondent.
- 31. The complainant's calculations of damages included an increase in February, 1990. The evidence did not establish on the balance of probabilities that Ms. Brown would have received an annual increase, or one at the same rate as the one she received in February, 1989. She had been employed at the respondent's place of employment less than a year at the time of the first increase and the evidence was insufficient to base a conclusion as to the probability of similar increases. Therefore we have not made an award for an increase in the following year.
- 32. Based on all the above, our award of compensation is as follows:

Calculation of Compensation Owing Deborah Brown

GROSS INCOME MINUS RED CROSS INCOME =

Amount Ms. Brown would have earned at Trelford Automobile

36 hours per week x \$6.85 x 46 weeks	\$11,343.60
4% vacation pay on \$11,343.60	453.74
Total	\$11,797.34
SUBTRACT EMPLOYMENT INCOME AND VACATION PAY FROM THE CANADIAN RED CROSS SOCIETY	
Employment income (based on pay stubs April 3/90 - July 23/90)	2,049.66
Vacation Pay (based on pay stubs April 3/90 - July 23/90)	<u>82.61</u>
Total received from Red Cross employment plus vacation pay	\$ 2,132.27(B)
THEREFORE TRELFORD'S PROJECTED	

9,665.07(C)

Calculate interest according to practise note 13 - rate Bank of Canada Prime Interest Rate as of date complaint filed (March 8, 1990) 13.5% taken from bank of Canada Review

THEREFORE, \$9,665.07/2 = 4832.54 4832.54 x .135 x 46 weeks/52

Total Compensation plus Interest 10,242.18(E)

33. The respondent is ordered to pay \$10,242.18 to Ms. Brown forthwith.

DECISION OF BOARD MEMBER R. W. PIRRIE; October 22, 1991

- 1. I dissent from the majority decision.
- 2. I cannot accept the rationale of the majority in arriving at the level of compensation they have awarded Ms. Brown. While I accept that Ms. Brown did not consciously delay filing her complaint in order to enhance her damages, the fact is there is an approximate ten-month period between her last day of employment and the day she filed her complaint during which she took no action.
- 3. The majority excuse and compensate Ms. Brown for some six of this ten month delay on the basis she was awaiting an inspector's report. The evidence we have is that the initial inspection of the work site was done on the basis of two anonymous complaints dated May 9 and May 19, 1989 to the Ministry of Labour complaints which Ms. Brown in her testimony never did acknowledge she initiated. That initial investigation in late May 1989 makes no mention whatsoever of the issue involved in Ms. Brown's work refusal. The subsequent inspection report, the one Ms. Brown waited until mid November 1989 for, flows from a further visit to the Trelford premises by an Inspector to deliver an October Consultant's report as a follow up to the initial inspection in May 1989. Once again the Consultant's report and the conveying November 16, 1989 inspection report make no reference to the issue involved in Ms. Brown's work refusal.
- 4. What we have then is a May 1989 inspection and report, done on the basis of an anonymous complaint. That report doesn't assist Ms. Brown's case. She waits for a subsequent inspection and report until mid-November 1989. That report doesn't assist Ms. Brown's case. She waits a further four months until March 1990 to file a complaint against her former employer. The majority compensate Ms. Brown for the time she waited for the second inspection report. I fail to understand why.
- 5. I do not agree the inspection reports are a factor which should play any part in compensating Ms. Brown. She didn't initiate them and they bear no relation to her work refusal. If however the majority want to take the reports into account, I would have thought it appropriate to utilize a date shortly after the first inspection was conducted and would have been available to Ms. Brown, as a basis for discounting her compensation. To compensate Ms. Brown while she waited for a second report, which contributed nothing to the issue is, in my opinion, illogical, wrong and excessive.

6. Ms. Brown was the author of the ten month delay in filing her complaint and I would not have compensated her for any portion of that time.

1878-90-U; 2600-90-U Arthur Varty, Complainant v. United Brotherhood of Carpenters and Joiners of America, Local Union No. 38 of the United Brotherhood of Carpenters and Joiners of America, and/or their successors, Local Union No. 18 of the United Brotherhood of Carpenters and Joiners of America, Edward P. Ryan (Board Member, 9th District), Claude Cournoyer (Representative) and Sigurd Lucassen (General President), Respondents

Discharge - Unfair Labour Practice - Trusteeship - Carpenters' local put under trusteeship and business agent discharged - Complaint relating to termination of business agent's employment - Board concluding that decision to discharge not tainted by motives proscribed by the Act - Complaint dismissed

BEFORE: Michael Bendel, Vice-Chair, and Board Members R. M. Sloan and D. A. Patterson.

APPEARANCES: John DiFiore and Arthur Varty for the complainant; Christopher Dassios, Claude Cournoyer, E. Ryan and Gilles Devost for the respondents.

DECISION OF THE BOARD; October 22, 1991

I

- 1. These two complaints, filed pursuant to section 89 of the *Labour Relations Act*, allege that the respondents (with the exception of Local Union No. 18 of the United Brotherhood of Carpenters and Joiners of America, hereinafter referred to as "Local 18") violated sections 66, 70 and 80 of the Act.
- 2. The complainant, Arthur Varty, was employed as a Business Agent by Local Union No. 38 of the United Brotherhood of Carpenters and Joiners of America ("Local 38"), based in St. Catharines, Ontario, until September 17, 1990. On that date, his employment was terminated and Local 38 was placed under the supervision (or trusteeship) of the United Brotherhood of Carpenters and Joiners of America ("the International"). The complainant relates to the termination of his employment. It is alleged that it was a violation of the Act for three distinct reasons:
 - (a) At the time of the termination, he was actively engaged in organizing the office employees of Local 38 with a view to their being represented in collective bargaining by the Hotel, Motel and Restaurant Employees Union, Local 442 ("Local 442"). In addition to the complainant, Local 38's office staff consisted of one full-time secretary and one part-time secretary. It is alleged that, contrary to section 66 of the Act, the termination of his employment was motivated, in part at least, by a desire to thwart Local 442's attempt to represent these employees.

- (b) On July 23, 1990, the complainant had filed charges, under the International's constitution, against Mr. Edward Ryan, a member of the International's Executive Board, and Mr. Claude Cournoyer, a representative of the General President. At the time of the termination of the complainant's employment, these charges had not yet been processed. It is alleged that, contrary to sections 66 and 70 of the Act, the termination of his employment was motivated, in part at least, by a desire to prevent these charges from being processed.
- (c) Local 38, through the complainant, had been pursuing a jurisdictional dispute before the Board against a local of the Labourers International Union of North America and an employer named G. Torno Engineering Inc. relating to the assignment of work ("the Torno dispute"). Mr. Ryan had expressed his opposition to this dispute proceeding. It is alleged that, contrary to section 80 of the Act, the termination of his employment was motivated, in part at least, by a desire to gain control of the carriage of this dispute so that it could be withdrawn.

II

Local 38 had a history of serious internal divisiveness. It was placed under the supervision of the International in 1979. Pursuant to what is now section 82(2) of the Act, the Board (differently constituted) consented, in 1980, to an extension of the trusteeship beyond the initial oneyear period (see United Brotherhood of Carpenters and Joiners of America, [1980] OLRB Rep. Oct. 1568). The Board there concluded (paragraph 9) that "Local 38 has become so torn by dissent that it cannot function properly". At various times after that trusteeship came to an end, the complainant occupied elected positions, including that of President, within Local 38, and also held the appointed position of Business Agent. In March 1990, the International's General President, Mr. Sigurd Lucassen, received a letter of complaint relating to Local 38. The letter, signed by ten officers and members of Local 38, called for an investigation of the affairs of the Local in view of alleged financial mismanagement, nepotism and failure to abide by the Constitution of the International and the By-laws of Local 38. Most of the allegations referred, explicitly or implicitly, to actions of the complainant, who was both Business Agent and President of Local 38 at the time. Mr. Ryan and Mr. Cournoyer, after meeting with the complaining offices and members at the request of Mr. Lucassen, made a report to Mr. Lucassen, who assigned a representative, Mr. John Diver, to conduct an investigation into the complaints. On April 19, 1990, Mr. Diver reported to Mr. Lucassen. The following are some extracts from his report:

The complaints listed in the members' letter to you dated March 11, 1990, are basically accurate. Brother Varty is a "Benevolent Dictator". He feels the Membership only interferes with his directing the local's business in an efficient way, that is in his view... There is a personality and power struggle going on between Varty - Devost and Piluso...

My conclusion and recommendation is that a Representative such as Claude Cournoyer (he was a member of Local 38 at one time) be directed to attend meetings of the Executive Board and Membership meeting to observe and advise the Executive Board of their duties without intimidation by the President. To be certain that all receipts and expenses are reviewed and approved or disapproved where necessary, both by the Executive Board and the Membership. This would require attendance at several meetings until all are aware of their duties and authority. Also to require the President to let the democratic process prevail. Total supervision has not worked in the past, if this doesn't work then maybe a look at consolidation with the nearest local should be considered.

- 4. On April 23, 1990, Mr. Lucassen, following the advice of Mr. Diver, ordered that the affairs of Local 38 be observed and monitored for compliance with the Constitution "for some period of time". He also directed that section 25(d) of the Local Union By-laws, which precluded business agents from also holding elected office, "should be complied with immediately". The complainant, at the time, was both Business Agent and President of Local 38. Compliance with this section of the By-laws had long been a bone of contention within Local 38. Acting on Mr. Lucassen's letter of April 23, Mr. Ryan ordered the complainant to resign from his position as President; this allowed him to retain his paid position as Business Agent. Mr. Ryan also assigned Mr. Cournoyer to work with Local 38 and to monitor its compliance with the constitution and By-laws.
- 5. In the course of this assignment, Mr. Cournoyer was in Local 38's office two or three times per week. He attended all Executive and Membership meetings of Local 38. He testified that the situation did not improve with the complainant's removal as President. The new President, Mr. Rudy Piluso, was "obsessed", he testified, with examining the alleged financial improprieties committed during the complainant's presidency. Mr. Piluso also had difficulty controlling meetings. As a result, according to Mr. Cournoyer, every meeting was a "free for all", with charges and counter-charges flying back and forth. Mr. Cournoyer estimated that no more than ten per cent of the time of meetings was devoted to looking after the interests of the members of Local 38; most of the rest of the time was spent debating things that had been going on within the Local over the previous ten or fifteen years. Members with no interest in this past history left meetings early or simply failed to attend meetings. As of the end of August 1990, there had been no improvement in the affairs of Local 38, according to Mr. Cournoyer.
- 6. On August 25, 1990, Mr. Piluso wrote to Mr. Lucassen to complain about the conduct of the complainant and other continuing problems in Local 38. He ended his letter as follows: "I am hoping that you will see this as an urgent case for immediate action". On August 29, Mr. Piluso again wrote to Mr. Lucassen in this vein, concluding as follows: "I ask that you come to a solution to this problem at any cost, whether be it under supervision or merge in another local". On August 31, Mr. Cournoyer, in a report to Mr. Lucassen, recommended that Local 38 "either be placed under supervision or merged with Local Union No. 18, Hamilton, Ontario". On September 4, Mr. Ryan recommended that Local 38 be placed under supervision "immediately" and that a merger with Local 18 be considered at a later date.
- 7. On September 10, Mr. Lucassen wrote to the Recording Secretary of Local 38 to state that he had placed the Local under supervision. "[T]he affairs and operations of Local 38", he wrote, "are being conducted in a manner that is inconsistent with the Constitution and Laws of the United Brotherhood and detrimental to the welfare and best interests of the membership and the United Brotherhood." Mr. Ryan was appointed as supervisor "to take immediate and full supervision over Local 38", and Mr. Cournoyer was appointed to assist him. Mr. Ryan was given "full authority over the conduct of the affairs of the Local Union, including the authority to conduct or cancel all meetings and to remove, replace and appoint any or all officers, Business Agents, Stewards, Delegates, committeemen, or employees of the Local Union..."
- 8. On September 17, at a Special Executive Meeting of Local 38, Mr. Lucassen's letter was read out by the Recording Secretary. Mr. Ryan terminated the complainant's employment as Business Agent and dismissed the Executive of Local 38. According to Mr. Cournoyer, the termination of the complainant's employment was necessary to "create stability" in Local 38. "There was no purpose in the International taking over the Local", he testified, "and leaving all of the old combatants in place." Mr. Ryan testified that it was normal procedure in the case of a supervision to start from scratch in an attempt to resolve the situation, and this meant dismissing everyone and

restructuring. Mr. Ryan was of the view that the complainant and the Executive of Local 38 had had a chance, during Mr. Cournoyer's earlier monitoring of the Local, to improve the situation. Mr. Ryan did not believe that the complainant and the Executive Board members could ever work together. Strife would continue in Local 38, he testified, as long as the complainant was there.

9. Effective January 1, 1991, Local 38 was merged with Local 18 in Hamilton. Local 18 was added as a respondent in these proceedings since it is the successor to Local 38 and the complainant asks to be reinstated in employment.

Ш

- 10. According to the complainant, he had discussed with the office employees of Local 38 the need for protection for themselves through union representation. This discussion was probably early in September 1990. They told him that one union with which they had spoken had turned them down since the unit would be too small. On September 12, 1990, the complainant met a Mr. White, the Business Agent of Local 442, to discuss the possible organizing of Local 38's office staff. That same day, the two secretaries signed membership cards in Local 442. The complainant himself signed a card on September 18. He discussed with Mr. White whether he could be in the unit himself. Mr. White replied that he was not sure of the complainant's status and that he would check with Local 442's international office. Mr. White later reported to the complainant that his international office had spoken to the Carpenters' international office, but the complainant's status was still not clear.
- Local 442 made application for certification as bargaining agent for Local 38's staff. The application is dated September 12. It is hand-written and signed by Mr. White. It describes the bargaining unit as "all employees of the respondent save and except supervisors and persons above the rank of supervisor in the Region of Niagara". Although the Registrar of the Board gave Local 38 notice of the application for certification by letter dated September 17, the evidence did not pinpoint the date it was first received at the office of Local 38. Mr. Cournoyer testified that he was not aware of any attempt by Local 442 to organize the staff of Local 38 until "a few days or a week" after the beginning of the supervision. Mr. Ryan testified that he learned of it from Mr. Cournoyer "at least a week" after the start of the supervision.

IV

- On July 23, 1990, while Mr. Cournoyer was monitoring the affairs of Local 38, the complainant filed charges against Mr. Cournoyer and Mr. Ryan under the International's Constitution. The two charges are identically worded. They allege that the persons charged exceeded the duties assigned to them by the General President by ordering or sanctioning an "unconstitutional meeting".
- Mr. Cournoyer testified that several charges had been filed against the complainant as well. Because of the in-fighting at Local 38 meetings, none of the charges was properly dealt with in accordance with the procedure laid down in the Constitution. According to Mr. Cournoyer, he informed the Executive, when the complainant proffered charges against himself and Mr. Ryan, that the Constitution established a special procedure for the laying of charges against General Officers or Representatives of the International. Specifically, the Constitution states, in Section 9, paragraph H, that no such officers or representatives "shall be subject to charges or trial in any Local Union or District Council". Mr. Cournoyer testified that he told the complainant to follow the proper procedures if he wanted these charges to be pursued. He testified that he "did not lose any sleep over the charges", because they had not been filed properly and because neither he nor

Mr. Ryan had done anything wrong. According to Mr. Cournoyer, after the charges were filed, nothing was done to process them.

- Mr. Ryan testified that Mr. Cournoyer informed him of rumors that the complainant would be laying charges against the two of them. He testified that he did not actually see the charges until a few days before the hearing by the Board of these complaints. He was not troubled by the charges since the Constitution was explicit on the question of how charges can be brought against General Officers like himself.
- When charges are brought in a Local Union under the Constitution, the procedure for 15. processing them, in the first instance, is for them to be referred to the Executive Committee of the Local Union. Charges have to be read at a meeting of the Executive Committee and laid over to the next meeting. If they are to be proceeded with, the member charged must be given notice by registered or certified mail and must be given a copy of the charges. The charges brought against Messrs. Cournoyer and Ryan, it appears, were read at a meeting, but the further steps in the procedure were not followed. The complainant was questioned at some length on why he failed to insist at subsequent meetings that the charges be processed. He testified that he was not given an opportunity to do so in view of the turmoil at meetings. He acknowledged, however, that, at the Membership meeting on August 27, 1990, he could have asked, under "Unfinished Business", for a report on the status of the charges he had brought. He denied that, after filing the charges, he just "let them sit" with no intention to proceed with them. He testified that he believed they were serious charges. According to the complainant, the trusteeship effectively prevented the charges from being pursued; he acknowledged that they could perhaps have been referred, after trusteeship, to the International, but that, he stated, would have been "futile".

 \mathbf{V}

- 16. The Torno dispute began in April 1989, with a work stoppage by members of Local 38 working for G. Torno Engineering Inc. on a job at the Welland Canal. The work stoppage, it appears, resulted from the employer's assignment of labourers to the job of dismantling forms, work claimed by the Local 38 members on the project. The employer filed a grievance and an application for a "cease and desist" order. The complainant persuaded the employees to return to work. Grievances were then filed against the employer on behalf of Local 38, alleging that the work should have been assigned to its members. On May 9, 1989, the Board (differently constituted) consolidated the hearing of the grievances and then adjourned them to allow for the filing of a jurisdictional dispute pursuant to section 91 of the Act. A jurisdictional dispute was later filed.
- At some point during the hearing of the Torno jurisdictional dispute before the Board, Mr. Ryan met the complainant in the cafeteria at 400 University Avenue. Mr. Ryan had no prior knowledge of the Torno matter. They discussed the case briefly. Mr. Ryan thought it was a waste of time and money to pursue it since the Carpenters had lost a well-known case in the 1960's in Sudbury on the same question, and he believed that the Sudbury case had definitively resolved this issue. He told this to the complainant and suggested the complaint be dropped. He also asked why his office had not been made aware of this jurisdictional dispute. The complainant did not say whether he would drop the complaint. Mr. Ryan also spoke at some point to the lawyer who was representing Local 38. According to Mr. Ryan, the lawyer was of the opinion that Local 38 was in a "no win" situation. Mr. Ryan was concerned that the Carpenters' Bargaining Conference ("the C.B.C."), which funds the prosecution of jurisdictional disputes on behalf of all Carpenters' locals within Ontario, had not been asked, before the fact, to support Local 38's position. Mr. Ryan spoke to officers of the C.B.C. and told them that, in his view, the Torno complaint was an "exer-

cise in futility" from the Carpenters' perspective. Mr. Ryan also believed that the jurisdictional dispute should have been processed, if at all, by the International.

- 18. After Local 38 was in trusteeship, Mr. Ryan instructed Local 38's lawyers to settle the complaint. Minutes of Settlement were signed on December 18, 1990. According to Mr. Ryan, the hearing before the Board on the Torno dispute lasted some 12 days in all (although the complainant put it at between eight and ten days). Mr. Ryan maintained that he could have had the case settled without having Local 38 placed in trusteeship. The Torno dispute, according to Mr. Ryan, was not a major issue between the International and the complainant. He denied flatly the suggestion that the trusteeship and the dismissal of the complainant had anything to do with the Torno dispute.
- 19. According to the complainant, Mr. Ryan told him on two occasions that the Torno dispute should be dropped. The complainant testified that Mr. Ryan gave him no reasons why he felt it should be settled. The membership of Local 38, according to the complainant, wanted the case to proceed, and he viewed his role as being to comply with the members' wishes. He reported regularly to the membership and no member ever suggested to him that it should be withdrawn. He testified that Local 38's lawyer told him that the case "looked O.K.". He noted in his testimony that the C.B.C. was funded by members' contributions, including the contributions of Local 38 members. He believed that the C.B.C. knew of the Torno dispute. He confirmed that the C.B.C. paid the fees of Local 38's lawyer. According to the complainant, his loss of the presidency affected his ability to deal with the Torno dispute since he could "no longer control the situation". Once he lost his job as Business Agent, he was completely out of the picture. Mr. Ryan settled the complaint, according to the complainant, for "everything the Labourers wanted". The complainant claimed that, as a carpenter, he had lost work as a result of the unfavorable outcome of this dispute.

VI

- The Board has no difficulty in concluding, on the basis of the evidence we heard, that the strife within Local 38 during the summer of 1990 was of genuine concern to the International. The affairs of the Local were virtually paralysed by the ongoing power and personality struggle involving the complainant and various members of the Executive of Local 38. Mr. Cournoyer's presence within the Local, as a representative of the General President, did little or nothing to resolve or defuse the conflicts within the Local. The Board is satisfied that the decision to impose trusteeship on the Local was taken by the General President because, as he put it, "the affairs and operations of Local 38 are being conducted in a manner that is inconsistent with the Constitution and Laws of the United Brotherhood and detrimental to the welfare and best interests of the membership and the United Brotherhood". Although, in his testimony, the complainant challenged some of the allegations made against him by his detractors within Local 38, he did not question the bona fides or the legitimacy of the decision to place the Local under trusteeship.
- We are also satisfied that, once the decision was taken to place Local 38 under trusteeship, it would have made little sense for the Local to continue employing the complainant as Business Agent. Mr. Ryan testified that it was normal practice, on a trusteeship, to remove from office all of the persons who had been involved in the preceding conflicts. We express no views on this general practice. However, we are satisfied that, in the case of Local 38, there was so much bad blood between the complainant and various members of the Local that his presence within the Local in any official capacity would likely have prevented the past from being buried, thereby guaranteeing a continuation of the crippling divisiveness that had marked the Local's operations. Without expressing any views on whether there existed legal justification for the decision to termi-

nate the complainant's employment, the Board has no difficulty accepting at face value Mr. Ryan's assertion that he regarded the termination of the complainant's employment as necessary to bring the strife within Local 38 to an end.

- 22. That, however, is not the end of the matter. Even if Mr. Ryan had good reasons for terminating the complainant's employment, there would be a violation of the Act if his decision were "tainted" by motives that are proscribed by the Act. Specifically, the complainant alleges that the decision was tainted in three ways:
 - (a) by a desire to thwart Local 442's attempt to organize the employees of Local 38:
 - (b) by a desire to prevent the processing of the charges the complainant laid under the Constitution against Mr. Cournoyer and Mr. Ryan; and
 - (c) by a desire to gain control of the carriage of the Torno dispute.
- In our view, there is no merit to the allegation that Local 442's bid to organize Local 38's office staff played any part in the decision to terminate the complainant's employment. Quite apart from other reasons for doubting this allegation, we are satisfied that the timing of the complainant's involvement with Local 442 conclusively disproves the allegation. It will be recalled that Mr. Piluso, President of Local 38, wrote to the General President on August 25 and again on August 29 pleading for a rapid conclusion to the conflict within the Local. On August 31, Mr. Cournoyer recommended supervision. On September 4, Mr. Ryan recommended immediate supervision. On September 10, Mr. Lucassen placed the Local under supervision and authorized Mr. Ryan, among other things, to "remove...Business Agents...of the Local Union". It was not until September 12 that the complainant, according to his evidence, first spoke to Mr. White from Local 442. Once the General President had authorized Mr. Ryan to remove the Business Agent from office, it was scarcely conceivable that he would not exercise that authority. In our view, the die was cast, as regards the termination of the complainant's employment, on September 10, 1990. at the latest. What remained to be done thereafter was little more than a formality. The effective decision to terminate the complainant's employment was thus taken, in our view, before he first contacted Local 442. Whatever other factors led to the decision to terminate his employment, his help to the office staff to become organized simply could not have played any part in the decision. The relationship between the termination of his employment and his contact with Local 442, in our view, is in all probability this: the complainant saw the writing on the wall in early September, at the latest, and likely decided that, for his protection and for that of the office staff, it might be advantageous to have union representation. We cannot conclude that the decision to terminate the complainant's employment was tainted by any concerns about the unionization of Local 38's office staff or about the complainant's role in their unionization.
- 24. The Board is also satisfied that the decision to terminate the complainant's employment was not tainted by a desire to prevent the processing of the charges he had laid under the Constitution against Messrs. Cournoyer and Ryan. We need express no views on whether the motivation alleged by the complainant would in fact be contrary to sections 66 and 70 of the Act, as his counsel has argued, since the allegation can be disposed of on its facts. It is obvious that the complainant's employment as Business Agent gave him no particular standing to pursue charges that he had filed under the Constitution. If the processing of the charges became problematical after September 17, 1990, (as we are prepared to accept), it was not because the complainant had ceased to be an employee of Local 38, but because Local 38 had been placed under supervision. The complainant remained a member of Local 38 at all material times. That gave him status to pursue a charge

under the Constitution. Mr. Ryan did not have to dismiss him from employment to deprive him of the possibility of pursuing his charges. It must be emphasized that the complaints of which the Board is seized do not challenge the decision to place Local 38 under trusteeship, but only the decision to dismiss the complainant. We are satisfied that there is no rational connection between the complainant's dismissal from employment and his ability to insist that the charges be processed. This, in our view, is sufficient to dispose of the allegation that the decision to terminate his employment was tainted by a desire to short-circuit the procedure for processing the charges. Without expressing any views on whether the charges were properly laid under the Constitution, we should add that we accept the assertions by Mr. Ryan and Mr. Cournoyer that the charges did not trouble them since, in their view, they had not been properly instituted.

- The final allegation is that the decision to terminate his employment was tainted by the 25. International's desire to gain control of the carriage of the Torno dispute so that it could be settled. Again, we express no views on whether, if the evidence proved that allegation, there would be a violation of section 80 of the Act, as argued. The fact of the matter is that, even if the International had a strong desire to settle the Torno dispute, it did not need to terminate the complainant's employment in order to do so. Whatever possibility the International might have had before the imposition of supervision to intervene in the Torno dispute, it is indisputable that, after September 17, the supervisor of Local 38, Mr. Ryan, could have instructed Local 38's lawyer to discontinue the dispute even if the complainant had still been employed. Mr. Ryan, as supervisor, had "full authority over the conduct of the affairs of the Local Union", according to the powers given to him by the General President. His power to settle the Torno dispute resulted, not from the complainant's dismissal, but from the trusteeship. As noted earlier, the decision to impose supervision is not challenged in these proceedings. To allege that Mr. Ryan dismissed the complainant so as to gain control of the carriage of the Torno dispute is to ascribe a wholly irrational motive to him. Quite apart from other doubts we have on this aspect of the complaints, it is quite implausible, in our view, that the Torno dispute was a factor in the decision to dismiss the complainant since there was no logical connection between his dismissal and Mr. Ryan's ability to settle the dispute.
- 26. For all these reasons, we have concluded that these complaints must be dismissed.

1172-91-FC United Food and Commercial Workers International Union, Local 175, Applicant v. Wendy's Restaurants of Canada Inc. Store #365, Respondent

First Contract Arbitration - Employer positions with respect to specific penalty clause and seniority held uncompromising and without reasonable justification - Employer positions with respect to recognition, union security, wages, benefits and bulletin board indicative of employer's failure to make reasonable or expeditious efforts to conclude a collective agreement - Employer positions with respect to several issues taken together with employer's conduct throughout negotiations evidencing underlying refusal to recognize bargaining authority of union - First contract arbitration directed

BEFORE: M. A. Nairn, Vice-Chair, and Board Members J. W. Murray and C. McDonald.

APPEARANCES: Leanne Chahley, Garry Thayer and Richard Woodruft for the applicant; C. G. Riggs, G. W. Giorno, C. Park, M. Inzetta, S. Wale, J. Shepherd, S. Lennon and A. White for the respondent.

DECISION OF THE BOARD: October 1, 1991

- 1. This is an application under section 40a of the *Labour Relations Act* ("the Act"). On August 21, 1991 the Board directed that the first collective agreement between the parties be settled by arbitration. We now provide our reasons for that determination.
- 2. The parties agreed to waive the time limits contained in section 40a of the Act. On August 2, 1991, the Board (differently constituted) ruled orally that whether as a matter of discretion and/or in light of the Board's decision in *Great Lakes Community Credit Union Limited*, [1991] OLRB Rep. June 758, it would not hear evidence concerning events occurring after the date of the filing of the application.
- 3. The relevant provisions of the Act provide as follows:
 - **40a.**-(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report on a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.
 - (2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,
 - (a) the refusal of the employer to recognize the bargaining authority of the trade union:
 - (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
 - (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
 - (d) any other reason the Board considers relevant.
- 4. It was the position of the applicant (the "trade union" or "union") that the process of collective bargaining had been unsuccessful because of circumstances which met the criteria set out in section 40a(2)(a), (b) and (c) and therefore a direction to settle the first collective agreement by arbitration should issue. It was the position of the respondent (the "employer") that even assuming that the process of collective bargaining had been unsuccessful (which it did not concede) there was no causal connection between the lack of success and any of the enumerated criteria in section 40a(2)(a) (d).
- 5. Garry Thayer, a business representative for the applicant gave evidence concerning the negotiations between the parties. The respondent did not dispute certain of the background information to this application but chose to call no other evidence. Some fifty or so documents were placed before the panel, including the written documents and proposals exchanged by the parties during the course of their negotiations. We do not intend to review that evidence or address all of the matters raised by the parties except as is necessary to explain our conclusion.
- 6. The applicant was certified on September 19, 1990 to represent all employees of the respondent at its location at 1411 Ouellette Avenue in Windsor (excluding office and clerical staff). The Board certificates describe a full-time employee bargaining unit and a part-time employee bargaining unit. The respondent operates approximately 141 fast food hamburger restaurants in Canada. This location is one of three in the City of Windsor. It also appears to be the first location

of the respondent to be unionized. The respondent operates its locations in Canada under a franchise agreement with Wendy's International located in Ohio.

- After forwarding a notice to bargain to the respondent, Mr. Thayer attempted to contact Mr. Inzetta, counsel to the respondent for the purpose of setting up negotiating dates. After some initial difficulty in making contact with each other, Mr. Thayer and Mr. Inzetta were able to agree to commence negotiations on November 15, 1990. Between November 15 and April 30, 1991, the parties met and negotiated (at times with the assistance of a conciliation officer) on fourteen different occasions. Some of those meetings went late into the night. At the outset of negotiations the parties agreed that they would deal with non-monetary issues prior to negotiating monetary issues and proposals were identified accordingly. The Minister of Labour released a "No-Board" Report on May 7, 1991. This application was filed July 4, 1991.
- 8. In its submissions, the applicant referred the Board to a number of its earlier decisions interpreting and applying section 40a(2). The respondent did not take issue with the propositions set out in those cases, although it disagreed with the applicant as to the conclusions the Board should reach on the facts before it in this case.
- 9. The thrust of section 40a of the Act was summarized in *Nepean Roof Truss Limited*, [1986] OLRB Rep. July 1005 at paragraphs 16 and 17:
 - 16. It is clear from these provisions that the legislature has acknowledged the significance to the collective bargaining relationship of the first contract, and has given statutory recognition to the potential difficulties that may be encountered in achieving it. This remedy does not supplant the primacy of the free bargaining process; rather, it recognizes that the negotiation of the first agreement may sometimes be thwarted by unjustified intransigence. Although this is remedial legislation and should be given a liberal construction and interpretation, the scheme of section 40a does not envision the automatically imposed settlement of a first collective agreement in all cases where the parties are unable to negotiate one. What it provides is access to this remedy where certain conditions precedent have been met. These conditions are enumerated in subsections (a) (d) of section 40a(2).
 - 17. To understand the conceptual underpinning of the legislation, it is useful to dissect the language of section 40a(2). The Board is directed to impose settlement of a first collective agreement by arbitration where "it appears ... that the process of collective bargaining has been unsuccessful because of ...". The Board is thereby obliged to consider the following factors:
 - i) "The process of collective bargaining". The use of the word 'process' imports into the deliberation an examination of the interaction between the two parties. It is a truism that the negotiation of any contract involves a considerable range of bargaining positions and tactics. It is a dynamic exchange, with each party relying as extensively as possible on those postures most likely to induce the other side to accept a tolerable result. The Board must therefore be sensitive to this bargaining reality when considering how each party has conducted itself. It is the totality of the process that is under scrutiny, and the Board must be cautious not to examine the complaint in a factual vacuum. The conduct of both parties is therefore relevant, not only for understanding why the process has been unsuccessful, but also for assessing whether it has been unsuccessful for any of the enumerated reasons. This does not intend to suggest that the applicant's conduct will be a bar to the imposed settlement of a first contract, but rather that its conduct is relevant in assessing the reason for the failure of the process.
 - ii) "The process ... has been unsuccessful because of ...". This language makes it clear that section 40a contemplates a cause-and-effect oriented assessment. Unless the applicant can demonstrate that the reason for the unsuccessful process is the employer's refusal to recognize the union's bargaining authority, the respondent's unreasonably uncompromising bargaining proposals, the respondent's dilatory or unreasonable

efforts to reach an agreement, or any other reason the Board deems relevant, then notwithstanding the failure to conclude an agreement, the Board is not entitled to direct its imposition. In the infancy of this legislation, it has yet to be determined what other reasons the Board may consider relevant within the meaning of section 40a(2)(d), but logic and the spirit of section 40a suggest that this will involve a caseby-case analysis of whether there is a causal connection between the "reason" in question and the failure of the collective bargaining process.

- "Irrespective of whether section 15 has been contravened". Section 15 of the Labour Relations Act imposes the duty to "bargain in good faith and make every reasonable effort to make a collective agreement". The reference to section 15 in this way can only be interpreted as making a distinction between bad faith bargaining and first contract assessments. The Board is not to be bound by whether or not the conduct complained of violates section 15. Given the Board's jurisprudence pursuant to section 15, wherein the Board has held that hard bargaining is not necessarily bargaining in bad faith (T. Eaton Company Limited [1985] OLRB Rep. March 491; Radio Shack [1985] OLRB Rep. Dec. 1789), one is left with the inescapable conclusion that the legislature has intended a different standard to apply in the determination of first contract disputes, a standard peculiar to section 40a adjudications. This does not suggest that contravention of section 15 is irrelevant. A contravention of section 15 may well be a factor to consider in assessing why the process was unsuccessful. But the absence of sufficient facts upon which to find a contravention of section 15 does not preclude the application of section 40a. Hard bargaining may not violate section 15, but rigid bargaining proposals may, if they fall within subsections (a) - (d) of section 40a(2), justify the imposed settlement of a first collective agreement.
- The respondent argued that as of the date of application the process of collective bargaining had not been unsuccessful. At the last negotiating meeting on April 30, 1991, the applicant informed the respondent of its intention to file its application under section 40a. Prior to filing its application the applicant agreed to meet with the respondent to negotiate and, following the filing of the application, it was agreed, did meet. In the circumstances, the fact that the applicant agreed to and did meet with the respondent is of little assistance in determining whether the process of collective bargaining was unsuccessful at the date of application. As Mr. Thayer testified, he would always be prepared to meet. This is not surprising if only because the parties to the process continue to have obligations under section 15 of the Act, and refusing to meet even in the face of a section 40a application might well result in a complaint being filed against the trade union. It is difficult to assess the process where the respondent is specifically aware of the trade union's intention to file a first contract application. These difficulties were touched on in the Board's decision in *Great Lakes Community Credit Union Limited*, *supra*, at paragraph 6.
- 11. On the other hand the parties had met on fourteen different occasions over a period of ten months and had exchanged proposals with respect to all outstanding issues except scheduling. Some of these meetings were conducted with the assistance of a conciliation officer. At the conclusion of the negotiations on April 30, virtually all monetary issues remained outstanding (including wages and benefits, vacations, holidays, sick leave, uniform allowance). In addition, a substantial number of non-monetary issues were not resolved including, the definition of employee, an assignment of work provision, union security provisions, elements of the management rights clause, an arbitration provision, certain specific penalty clauses (and language respecting cash shortages), strike and lock-out language, the definition and accumulation of seniority, language respecting job promotion, lay-off and recall, hours of work, overtime and scheduling, provision for use of a bulletin board, and the term of the agreement. The parties were at an impasse with respect to (at a minimum) the issues of union security, hours of work and scheduling, wages and benefits, and Article 9.03. Reviewing all the evidence we have no doubt that at the date of application the process of collective bargaining between these parties was unsuccessful (See *Alma College*, [1987] OLRB Rep. Dec. 1453, and *MacMillan Bloedel Building Materials Limited*, [1990] OLRB Rep. Jan. 58).

- 12. It was the position of the respondent that even if the Board were to conclude that the process of collective bargaining had been unsuccessful, no causal connection had been established between that lack of success and any of the enumerated provisions in 40a(2)(a)-(d). The respondent asserted two reasons for any lack of success in the bargaining. The first reason essentially was that the union was not getting what it had hoped for and had filed its application in anticipation of doing better. The second reason put forward by the respondent was the conduct of Mr. Thayer through the course of negotiations.
- 13. It is axiomatic to conclude that if a trade union files an application for a direction under section 40a of the Act it did not obtain in collective bargaining what it had hoped for. If it had, there would be no application. Similarly, because no collective agreement has been reached between the parties it might be assumed that the respondent is not "getting what it hoped for" in the negotiations either. Neither proposition precludes a conclusion that collective bargaining has been unsuccessful because of one or more of the enumerated reasons in section 40a(2)(a)-(d).
- The second reason put forward by the respondent for the lack of success in collective 14. bargaining is the conduct of Mr. Thayer throughout the negotiations. Mr. Thayer testified before the panel and we note at the outset that we found him to be an entirely credible witness. He was forthright both in his examination-in-chief and cross-examination notwithstanding what amounted at times to a fairly personal attack on his competence and experience. This occurred in the context of a respondent who admittedly was engaged in its first set of collective bargaining negotiations, where no one who participated in the negotiations on behalf of the respondent testified, and in the face of uncontradicted evidence with respect to the respondent's conduct in the negotiations. In support of its position, the respondent pointed to evidence that Mr. Thayer had misunderstood certain terminology including the meaning of a Rand Formula union security provision, and had failed to understand the company's position on scheduling. We find the respondent's position to be completely without merit. To the extent that there is a human element contained in any set of negotiations and that mistakes will be made, Mr. Thayer acknowledged those on his part and allowed the respondent the same latitude. However to the extent that there was uncertainty concerning the meaning of certain jargon and its effect, the uncontradicted evidence is that in each case Mr. Thayer explained what he meant by the use of his terms. However, upon a request by Mr. Thayer to the respondent to explain its use of the term "Rand Formula", the respondent suggested that Mr. Thayer "go look it up for himself". Obviously even if Mr. Thayer had conducted his own inquiry there is no guarantee that the information he would have obtained would have been consistent with the respondent's understanding of its own proposal. Certainly in the face of an express request by the other party it is incumbent on the respondent to explain its understanding and use of terms.
- With respect to the suggestion that Mr. Thayer did not understand the employer's position on scheduling again, the uncontradicted evidence is that on numerous occasions Mr. Thayer requested that the employer supply him with schedules. Mr. Thayer had received information from employees in the bargaining unit with respect to the number of hours of work available and staffing. That information differed from what the respondent was putting forward in support of its proposal in Article 20. The respondent maintained the position throughout negotiations that employees were scheduled solely on the basis of their availability. Scheduling was therefore unpredictable and inconsistent. The applicant was of the view that there was a core group of full-time employees and regular part-time employees who were prepared to make a commitment regarding working hours, while acknowledging that the majority of employees were students whose availability was unpredictable. Rather than providing Mr. Thayer with copies of schedules (which it had not done as of the date of this application), the respondent simply maintained its position that Mr. Thayer either failed or was unable to understand that employees were scheduled according to their avail-

ability. (The respondent did review a one-day schedule at one meeting. However we accept the inference from Mr. Thayer's testimony that it provided little if any assistance and failed to provide the applicant with the information it was requesting).

- The respondent also suggested that Mr. Thaver was not prepared for negotiations. Mr. Thaver conducted a meeting with the members of the bargaining unit in order to determine their priorities and learn of their particular concerns. Then with the assistance of another business representative he drew proposals from a master collective agreement. He reviewed collective agreements of the applicant to find one with an employer that was as similar as possible in nature to this employer's operation. From those sources a series of proposals for a collective agreement was prepared. Mr. Thayer then met with the elected negotiating committee to review the proposals in anticipation of the first negotiating meeting. The only evidence that we have with respect to the respondent's state of preparation for the negotiations is Mr. Thayer's uncontradicted evidence. Having tabled proposals at the first meeting, Mr. Thayer was left with the understanding that at the next meeting the company would respond. The parties spent the second day reviewing four of the applicant's proposed Articles. Mr. Thaver was of the view that the respondent's representatives were reading the proposals for the first time. Having reviewed an article and posed questions, the discussion would not continue until the respondent's representatives had taken time to read the next proposal and formulate questions with respect to it. There is simply no evidence to support the respondent's proposition that Mr. Thayer's conduct was the reason that the process of collective bargaining had been unsuccessful. Therefore we rejected the second reason advanced by the respondent for the lack of success in collective bargaining.
- 17. It remained to be determined whether or not the process of collective bargaining had been unsuccessful because of any of the reasons enumerated in section 40a(2)(a) (d). We were satisfied that the criteria set out in sub-paragraphs (a), (b) and (c) had been met in the circumstances of this case.
- 18. We will deal with the evidence with respect to the criteria in section 40a(2)(b) first. Two of the key stumbling blocks between the parties in these negotiations were Articles 9.02 and 9.03 of the employer's proposals. Article 9.02 is a provision that contemplates that if an employee is disciplined for theft and there is an arbitral finding of fact that a theft occurred (or where there is a cash shortage where the employee is responsible for the cash at the time in question and at arbitration there is a finding to that effect) then an arbitrator would have no jurisdiction to modify the penalty imposed by the employer. Article 9.03 can be referred to as a specific penalty clause and it provides as follows:
 - 9.03 Without restricting the Company right to discharge for cause generally, the specific penalty for the following infractions will be discharge:
 - (a) theft, fraud or dishonesty;
 - (b) serious misconduct;
 - (c) conduct incompatible with the employee's duties or prejudical to the Company's interests:
 - (d) gross insubordination;
 - (e) failure to comply with a reasonable order of an immediate supervisor;
 - (f) consuming or selling alcohol or drugs on Company premises or reporting to work under the influence of either substance.

In such cases the jurisdiction of a board of arbitration shall be limited to determining whether or not the infraction occurred.

19. Both these proposals have been on the table without amendment throughout the course of negotiations. The union initially took the position that it was unable to agree to either Article

9.02 or Article 9.03 and that the employer was protected by virtue of the management rights clause (which provides that the employer can discharge or otherwise discipline any employee for just cause provided that the matter may be made the subject of a grievance). On April 1, 1991 the respondent re-submitted these proposals indicating simply that the issue was important to it in operating the restaurant. The union reiterated its view that the respondent already had the right to terminate employees under the management rights clause. On April 15 the employer re-submitted the proposals with no further explanation. On April 21 the union moved to the position that it would agree to Article 9.02 if the respondent would drop Article 9.03. On April 29 the company responded that the two articles were separate issues. There is no evidence of any other explanation. By the end of the negotiations on April 30 the respondent was still proposing Article 9.02 and Article 9.03 in their entirety.

- 20. Throughout the negotiations the union has taken the position that Article 9.03, by virtue of the breadth of conduct that would result in the specific penalty of discharge, effectively eliminated any job security established by the just cause protection in the management rights clause. In the union's view Article 9.03 would allow the respondent to terminate anyone's employment at any time for any reason. It further precluded the arbitral review of the penalty notwithstanding the nature of the offence or any other relevant circumstances.
- The respondent argued that the parties were only in dispute as to the extent of those matters covered by the specific penalty clause. Counsel also suggested that many of the subparagraphs would be subject to a test of reasonableness in any event. With respect to this latter proposition there is no evidence of any suggestion to the applicant that the employer's intention was to agree to apply a standard of reasonableness with respect to what might constitute for example, gross insubordination, or serious misconduct. To the contrary, the employer had proposed in Article 4.02 that no arbitration board would have the right to impose a standard of reasonableness upon any exercise of management prerogative wherever it be contained in the collective agreement unless such standard of reasonableness was expressly set forth in the agreement. This issue had been discussed between the parties and the respondent did identify areas in its proposals which expressly set out a standard of reasonableness. Regardless of whether or not the respondent now takes the position that certain matters in Article 9.03 would be subject to a test of reasonableness (of which we have no evidence) it cannot overcome the effect of its position throughout bargaining.
- While there is no doubt that the applicant was concerned that the proposal in Article 9.03 raised what might be referred to as definitional problems (such as what constituted "serious" misconduct) the applicant pointed to Article 9.03(c) to support its concern about job security. As noted this proposal remained on the table without amendment from its tabling to April 30th. We have no hesitation in concluding that the respondent took an uncompromising position and we are further satisfied that it was without reasonable justification. In fact, no justification has been provided for why the employer might require a provision such as this. The parties have agreed that employees are to be protected from discipline or discharge without just cause. To the extent that just cause can be defined it has come to mean conduct that is incompatible with the employment relationship. In essence Article 9.03(c) defines just cause and provides that in any case the specific penalty will be discharge. That penalty is not reviewable by arbitration. Mr. Thayer testified that one of the union's primary concerns in this set of negotiations was to ensure a fair and equitable discipline system. This proposal not only provides no protection against the possibility of arbitrary or discriminatory imposition of disciplinary penalties but arguably goes so far as to preclude any discipline system except one of discharge. The respondent provided no justification for its position in bargaining. We were satisfied that the process of collective bargaining had been unsuccessful

because of the employer's uncompromising position without reasonable justification in respect of Article 9.03.

- 23. While the lack of success in bargaining over Article 9.03 may well be sufficient for a finding that a direction should issue, there were other proposals which led us to conclude that the process of bargaining had been unsuccessful because of an uncompromising position taken by the respondent without reasonable justification.
- In Article 13.01 the applicant proposed that seniority be defined as length of continuous service in the bargaining unit. It was the respondent's position that seniority be defined as length of uninterrupted service with the company. The parties maintained their respective positions throughout the course of the negotiations and the matter was still outstanding as of the date of filing the application. The respondent's position in its written proposals of April 30 was that employees should not be discriminated against and should be credited with time spent with the company at any location and regardless of whether or not it was unionized. The effect of the respondent's proposal would be to recognize seniority for employees at 141 locations throughout the country for purposes of exercising seniority at one location in Windsor. The union was again concerned about job security for the members of the bargaining unit. The employer could hire someone new to that location from elsewhere in the company with the result that that employee would have greater seniority than anyone in the bargaining unit. That employee could then be promoted or protected from lay-off over those employees who had chosen to be represented by the applicant. We note that the respondent's proposals appear to make a distinction between senjority and service - for example as between job promotion opportunities and vacation entitlement. It is not apparent that any legitimate employer objective was being sought by the respondent's proposed definition of seniority. We can assume that the definition of seniority proposed by the applicant is one that the employees in the bargaining unit support. As indicated in Nepean Roof Truss Limited supra, recognition of seniority rights is one of the fundamental attributes of trade union representation. In this context the mere assertion that employees ought not to be discriminated against provides no justification. We were unable to conclude that there was a reasonable justification for the uncompromising position taken by the respondent in respect of Article 13.01.
- A number of factors combined to also lead us to conclude that collective bargaining had been unsuccessful because of the respondent's failure to make reasonable or expeditious efforts to conclude a collective agreement (section 40a(2)(c)). It is apparent that during the early part of the negotiations the respondent's proposals did not make a distinction between recognition of the bargaining agent and union security provisions. The applicant was certified to represent all employees of the respondent (both full-time and part-time) save and except Assistant Manager, those above the rank of Assistant Manager, and office and clerical staff. The union's initial proposal for recognition simply reiterated the language in the Board's certificates. The effect of the employer's initial proposals in Articles 2.01, 2.02, 3.01, and 3.05 would have the employer recognize the trade union as the representative of employees who had completed their probationary period, who had elected to join the trade union, and who were entitled to receive wages for work performed. Those proposals were tabled by the respondent at the fourth negotiating session and remained on the table with only minor amendments until February 12 (the 8th negotiating meeting). In the employer's document dated March 1, 1991 it recognized the bargaining units set out in the Board certificates. However Article 2.04 of the respondent's proposals continued to make reference to "non-management personnel who elect not to being [in] the bargaining unit". It was not until April 15 at the 11th negotiating session when the respondent agreed to the removal of these words.
- 26. The union initially proposed that all employees become and remain members of the trade union as a condition of employment. The respondent's initial position was that membership

in the trade union be optional to employees. The effect of the respondent's proposals in Articles 2.01, 2.02, 3.01 and 3.05 would arguably be to deduct dues only from employees who had completed their probationary period and who had joined the trade union. The respondent's Article 3.01 stated that this was pursuant to section 43 of the *Labour Relations Act*. Section 43 requires the inclusion of a clause requiring the deduction of dues from all employees in the bargaining unit if requested by a trade union. As of March 1, the respondent had moved to the position that dues would be deducted from all employees in the bargaining units set out in the Board's certificates provided they had completed their probationary period, again stating that this was pursuant to section 43.

- On April 1 the respondent agreed to delete the reference to the probationary period in the union security language, however that restriction re-appears in its draft proposal C-12 dated April 15, 1991. On April 2 the applicant indicated some willingness to move. To that point the justification for the respondent's position was that it felt employees should have a choice with respect to trade union membership. In response the applicant took the position that all current employees who were trade union members were to remain members and that new hires would be required to become members. The trade union felt this addressed the issue of choice because new employees would be aware on hiring that if they were to accept the job they would be required as well to join the trade union. However current employees who had chosen not to become members of the trade union would not be required to do so.
- At the end of the day on April 15 the respondent proposed a Rand Formula union security provision to provide that all bargaining unit employees would be required to pay union dues but that union membership would be voluntary. At the end of the negotiations on April 30 the employer was maintaining this position. The applicant maintained its position put forward on April 2. We are satisfied that the conduct over the negotiations with respect to these two issues evidences a failure on the part of the respondent to make reasonable or expeditious efforts to conclude a collective agreement. The earlier positions taken by the respondent evidence a refusal to recognize the trade union as bargaining agent for the employees in the bargaining unit. In the respondent's documents filed as C-3 and C-4 (February 11) the respondent states it does not agree to a closed shop but goes further and states that the respondent will "only recognize trade union for employees who have joined union". As indicated that position was maintained until the 8th negotiating session. Although as of the date of filing the application the respondent had changed its position, those initial and unreasonable (if not illegal under sections 15 and 64 of the Act) proposals delayed the negotiations (and may well have set the stage for subsequent problems in negotiations).
- 29. In addition to our concern about the recognition and union security issues, other factors combined to support our conclusion that the respondent failed to make reasonable or expeditious efforts to conclude a collective agreement.
- The issues of wages and benefits remained unresolved between the parties. The applicant initially proposed a benefit package and provided the respondent with information concerning its proposed plans. The employer's only apparent response to the issue of benefits was that it was not willing to negotiate benefits because no one else in the industry provided them. That position was maintained throughout bargaining. There was little, if any, serious negotiating concerning wages. The respondent tabled and held to the position that it would not pay wages in excess of those paid by its competitors. That was the rate set by the government through the minimum wage provisions (although the proposal itself allowed for discretionary increases). The applicant was unwilling to agree to a discretionary package, and noted that the effect of the respondent's proposal was to maintain employees' wages at minimum wage for a proposed three year period. Crossexamined at considerable length concerning his knowledge of the respondent's financial position in

a competitive marketplace Mr. Thayer did not agree with the proposition put forward by respondent counsel that in any case where an employer pays wages in excess of its competitors it is invariably placed at a competitive disadvantage. Having heard the evidence of the process of negotiations between these parties and the various positions taken, we were satisfied that the respondent's uncompromising position on the issues of wages and benefits was, in context, a refusal to bargain these issues with the trade union. While that also supports a finding under section 40a(2)(a), we were satisfied that the refusal to bargain evidenced a failure to make reasonable or expeditious efforts to conclude a collective agreement.

- At the fourth negotiating session the respondent tabled a document filed as C-1 and titled Collective Agreement. To that point the parties had been working from the applicant's proposed document. Over the course of negotiations the respondent tabled six further similar documents. The remaining documents are titled Collective Agreement Draft Proposal. In its pleadings the respondent suggested that these draft documents were not intended to report any movement on any outstanding issues. Rather, they were intended to record settlement on agreed issues and to identify the respondent's original position on outstanding issues. On a review of the documents that is simply not the case. Substantial changes in the respondent's proposals appear in each succeeding document. In the early stages of negotiations changes or additions to each earlier draft were not identified. Each time the respondent presented the applicant with a draft document, the applicant was required to review it in its entirety before the negotiations could continue. It appears that it was not until the respondent's fourth draft proposal dated March 1, 1991 that it began to underline those changes or additions to the language that it had provided earlier on those issues remaining in dispute. As Mr. Thayer indicated the documents prepared by the employer at the latter stages of negotiations were useful. Whether the earlier failure by the respondent to identify or indicate movement or change was intentional or as a result of inexperience or ineptitude is irrelevant. It is apparent that the initial format of the documents contributed to some substantial delay in the process (see Grant Forest Products Corporation, [1991] OLRB Rep. July 848. The applicant had to review each of those items still in dispute simply in order to determine the respondent's current position. In addition, it became apparent that there were a number of errors with respect to items indicated as agreed when there had been no agreement or vice versa. To take one example, in Article 2.01(a), between documents C-7 and C-9, the respondent added the words "for work" to language that had been agreed to. The respondent did subsequently agree to remove those words. A second example is union proposal 6.03. It mirrored the respondent's proposed Article 6.08 (except for the word "full"). It appears in the respondent's document C-2 in italics suggesting that the language is agreed to. However the language has been changed from "working" days to "calendar" days. We have no explanation about any negotiations over this change except to note that the applicant did subsequently agree to the change to calendar days. We note these examples only to show that based on the documents formulated by the respondent additional time and effort was required to identify and deal with movement by it further delaying and frustrating the negotiation process.
- 32. As set out at paragraph 16 herein, the evidence is uncontradicted that the representatives of the respondent came to the early negotiating sessions not prepared to respond to the applicant's proposals. We also refer to those matters in paragraphs 14 and 15 of this decision in support of our conclusion that the respondent failed to make reasonable or expeditious efforts to conclude a collective agreement.
- 33. The respondent took the position in negotiations that there would be no agreement on individual matters until the entire collective agreement had been settled. Rather than the more usual understanding of parties in collective bargaining that negotiated items be "signed-off" although there may not be "agreement" until negotiations are completed, the respondent, at least

in the early stages of negotiations, took the view that all negotiated items were available for renegotiation following discussions on remaining issues. Collective agreements are "living" documents, open to being fine-tuned in subsequent rounds of bargaining. Otherwise there would be no certainty during the process and the potential for delay is immense.

- At the outset of negotiations the applicant also requested seniority lists, and information about wages, benefits, any wage progression scales, health and safety equipment utilized, and uniforms. Although certain information was provided it was incomplete. For example the respondent advised that uniforms were supplied without indication of how many, what type, and how often. Similarly the respondent advised that safety wear was provided in accordance with WCB and WHMIS regulations but did not identify what this included. A discount on food items was identified as a benefit. The respondent later also referred to and relied on a scholarship fund available to employees. At the fourth negotiating meeting there was reference to a "standard labour guideline" in the respondent's proposals. The guideline was not provided although requested by the applicant. Reference to the guideline was later dropped from the respondent's proposal. We were given no explanation as to why this information was not provided.
- 35. As the Board stated in *Co-Fo Concrete Forming Construction Limited* [1987] OLRB Rep. Oct. 1213 at paragraph 30:
 - 30. It is hard to imagine what employer interest in such information could outbalance the union's interest in the addresses and telephone numbers of the person for whom it has the right and obligation to act as agent. In any event, it is unnecessary to speculate about whether there are some kinds of needed information which an employer is entitled to withhold because of countervailing interests: this employer identified no such purported countervailing interest, nor did it deny having any of the information sought it simply presumed to make its own assessment of the union's need for the information. It is not for an employer to assess how much such information is or is not needed by its employees' exclusive bargaining agent in order to properly represent those employees in bargaining. Having regard to the analysis in the decision cited earlier, the employer's failure to comply with the union's request for the names, addresses, telephone numbers and wage rates of employees in the bargaining unit amounts to a "failure of the respondent to make reasonable... efforts to conclude a collective agreement" within the meaning of subparagraph (c) of subsection 40a(2) of the Act and, even more fundamentally, also constitutes a "refusal of the employer to recognize the bargaining authority of the trade union" within the meaning of subparagraph (a).

[emphasis added]

- 36. Finally, the applicant originally proposed that the company agree to provide a bulletin board on which the union could keep notices of meetings and other union business. That proposal went on to provide that before being posted, notices would first have to be approved by the store manager. After fourteen negotiating sessions this matter remained unresolved. To the extent that the respondent provided any explanation in the negotiations it appears to have been concerned about the nature and extent of material to be posted by the union. The union noted that its proposal acknowledged the discretion to the company to effectively determine what would be posted. Given the nature of the trade union's initial proposal and the position of the respondent at the final negotiating meeting this is also a factor indicative of the respondent's failure to make reasonable or expeditious efforts to conclude a collective agreement.
- We were satisfied that the respondent's positions with respect to the issues of recognition, union security, wages and benefits, seniority and Article 9.03(c), taken together with the respondent's conduct throughout the negotiations evidenced an underlying refusal to recognize the bargaining authority of the trade union (section 40a(2)(a)). We think it not coincidental that issues that are fundamental to trade union representation were issues on which the respondent either

refused to negotiate or "negotiated" only to a point where its position met other legal obligations (recognition and union security for example) and only after a considerable period of delay. While hard bargaining may not result in the finding that an employer failed to bargain in good faith, it may result in collective bargaining that is unsuccessful within section 40a(2)(a)-(d).

38. For the foregoing reasons the panel concluded that the criteria established in section 40a(2)(a), (b) and (c) had been met and consequently directed the settlement by arbitration of the first collective agreement between the parties.





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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING SEPTEMBER 1991

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2776-89-R: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild, (CLC, AFL-CIO) (Applicant) v. Thomson Newspaper Company Ltd. (Respondent)

Unit #1: "all employees of the respondent employed in the editorial department of the Daily Mercury Division, in the County of Wellington, save and except city editor, managing editor, wire editor, regional editor, and persons exercising managerial functions or employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3)(b) of the Act, persons regularly employed for not more than 24 hours per week and students employed during the school vacation periods" (85 employees in unit) (Having regard to the agreement of the parties)

Unit #2: "all employees of the respondent in the editorial department of the Daily Mercury Division, in the County of Wellington, regularly employed for not more than 24 hours per week and students employed during the school vacation periods, save and except city editor, managing editor, wire editor, regional editor, and persons exercising managerial functions or employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3)(b) of the Act" (85 employees in unit) (Having regard to the agreement of the parties)

2200-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (Applicant) v. Nichiran Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Brantford, save and except supervisors, those above the rank of supervisor, office, clerical and sales staff" (90 employees in unit) (Having regard to the agreement of the parties)

3189-90-R: Ontario Public Service Employees Union (Applicant) v. Durhamdale Inc. (Respondent)

Unit #1: "all employees of the respondent in the Town of Pickering, save and except Assistant Director, persons above the rank of Assistant Director, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (9 employees in unit) (Having regard to the agreement of the parties)

Unit #2: "all employees of the respondent in the Town of Pickering regularly employed for not more than 24 hours per week and students employed during the school vacation period" (9 employees in unit) (Having regard to the agreement of the parties)

0570-91-R: Teamsters, Local Union 938 (Applicant) v. Rio Algom Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at its Atlas Alloys Division in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, sales, technical and clerical employees, students employed during the school vacation period and students employed in a co-operative training program" (98 employees in unit) (Having regard to the agreement of the parties)

0646-91-R: Ontario Catholic Occasional Teachers' Association (Applicant) v. Peterborough, Victoria, Northumberland and Newcastle Roman Catholic Separate School Board (Respondent)

Unit: "all occasional teachers as defined by section 1(1)(31) of the *Education Act* employed by the respondent in the Counties of Peterborough, Victoria, Northumberland and Newcastle, save and except persons who when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*" (152 employees in unit) (*Having regard to the agreement of the parties*)

0910-91-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Elgin County Board of Education (Respondent)

Unit: "all employees of The Elgin County Board of Education, save and except supervisors and head custodians, persons above the rank of supervisor and head custodian, and employees in bargaining units for which any trade union held bargaining rights as of June 17, 1991" (17 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

1009-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Friendship Construction Company Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, and the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1102-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Francos Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1103-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Halton Bricklayers Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1105-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. One Way Masonry (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1106-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Fersil Masonry (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1113-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Mill Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

1114-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. B. C. Construction Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1115-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Interline Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1117-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Last Line Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (15 employees in unit)

1118-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. M. L. Masonry (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the

industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

1120-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. R.P.M. Masonry Ltd. and Ribeiro Masonry Inc. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (19 employees in unit)

1121-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Portuga Construction Ltd. and Astrol Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

1123-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Palasar Construction Inc. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

1124-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Pombal Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1125-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. P & P Construction (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1128-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Bricklayers (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oak-

ville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

1129-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. OESTE Bricklayer Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

1130-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Novlar Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (17 employees in unit)

1131-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Atlantic Masonry Ltd. 663086 Ontario Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1149-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Vision Masonry Inc. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

1189-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Matias Masonry Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (23 employees in unit)

1190-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. S. F. Construction (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

1191-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. B & B Masonry (formerly H & H Masonry) (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1225-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Fly Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1232-91-R: International Union of Bricklayers & Allied Craftsmen, Local 2, Ontario (Applicant) v. Mascone Masonry Group (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices and all construction labourers in the employ of the respondent in all of the construction industry in the the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1273-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Minho Masonry Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1274-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Solar Masonry Co. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1275-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Clay Pine Masonry Inc. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in

the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1276-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Jobral Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1277-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Eagle Bricklayer Construction Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (24 employees in unit)

1304-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Real Masonry (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1348-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Nordeste Masonry (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1364-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Jamor Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1415-91-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the

United States & Canada, Local 666 (Applicant) v. 842699 Ontario Ltd. o/a Dayboll & Young Plumbing & Heating (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

1467-91-R: Ontario Public Service Employees Union (Applicant) v. The Religious Hospitallers of Saint Joseph of the Hotel Dieu of Kingston (Respondent)

Unit: "all medical laboratory technologists, medical laboratory technicians and their assistants of the respondent in the City of Kingston regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except chief technologists and persons above the rank of chief technologist, office and clerical staff and persons for whom any trade union held bargaining rights as of July 23, 1991" (15 employees in unit) (Having regard to the agreement of the parties)

1468-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Louri Bricklayers Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1523-91-R: IWA-Canada (Applicant) v. Field Lumber (1956) Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at its saw mills, planning mills and yards in the Townships of Field and Badgerow, save and except foremen, persons above the rank of foreman, office and sales staff" (85 employees in unit) (Having regard to the agreement of the parties)

1535-91-R: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. Silvano Ferrato Construction, Division of 825420 Ontario Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1539-91-R: International Union of Bricklayers & Allied Craftsmen, Local 2 (Applicant) v. T.C. Bricklayers (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices and all construction labourers in the employ of the respondent in all sectors of the construction industry the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1558-91-R: International Union of Bricklayers & Allied Craftsmen, Local 2, Ontario (Applicant) v. Stroke Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices and all construction labourers in the employ of the respondent in all sectors of the construction industry the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

1570-91-R: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Corporation of the City of Toronto (Respondent)

Unit: "all journeymen and apprentice sheet metal workers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice sheet metal workers in the employ of the respondent in all sectors of the construction industry in the the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1590-91-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Skyline Painting & Decorating Ltd. (Respondent)

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1596-91-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Bella Vista Painting & Design Ltd. (Respondent)

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1597-91-R: Labourers' International Union of North America, Local 607 (Applicant) v. MNT Builders Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1623-91-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Northtown Structural Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1627-91-R: International Union of Bricklayers & Allied Craftsmen, Local 2 Ontario (Applicant) v. Summit Masonry (1988) Inc. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices and all construction labourers in the employ of the respondent in all sectors of the construction industry the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman' (6 employees in unit)

1678-91-R: Ontario Public Service Employees Union (Applicant) v. Stevenson Memorial Hospital (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Town of Alliston, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate, undergraduate and registered nurses, paramedical employees, office and clerical staff and security personnel" (115 employees in unit) (Having regard to the agreement of the parties)

1701-91-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local 91 (Applicant) v. Olympia Tile International Inc. (Respondent)

Unit: "all employees of the respondent in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (8 employees in unit) (Having regard to the agreement of the parties)

1704-91-R: Teamsters, Local Union No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers (Applicant) v. Lafarge Canada Inc. (Respondent)

Unit: "all employees of the respondent at its permanent concrete division, Ready-Mix plant, working in and out of Smiths Falls, save and except foremen, persons above the rank of foreman, office and sales staff" (10 employees in unit) (Having regard to the agreement of the parties)

1722-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. M. J. Dixon Const. Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria; the County of Simcoe and the District Municipality of Muskoka, and in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the

industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1732-91-R: International Union of Bricklayers & Allied Craftsmen, Local 20, Oshawa (Applicant) v. S.F. Masonry (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices and all construction labourers in the employ of the respondent in all sectors of the construction industry the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman' (14 employees in unit)

1767-91-R: Canadian Merchant Service Guild (Applicant) v. Owen Sound Transportation Company Ltd. (Respondent)

Unit: "all employees of the respondent operating at and out of Tobermory, save and except office and clerical staff, masters, chief engineers, stewards, and persons for whom any trade union held bargaining rights as of August 19, 1991" (6 employees in unit) (Having regard to the agreement of the parties)

1774-91-R: Canadian Union of Public Employees (Applicant) v. Ceaderbrook Lodge Management Corporation (Respondent)

Unit: "all employees of the respondent at its Ceaderbrook Lodge in Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office, clerical and technical staff, social director, marketing director and persons for whom any trade union held bargaining rights as of August 20, 1991" (32 employees in unit) (Having regard to the agreement of the parties)

1801-91-R: Ontario Public Service Employees Union (Applicant) v. West Parry Sound Association for Community Living (Respondent)

Unit: "all employees of the respondent in the Town of Parry Sound, save and except supervisors and co-ordinators, persons above the rank of supervisor and co-ordinator, secretary to the program director and assistant to the financial manager" (34 employees in unit) (Having regard to the agreement of the parties)

1803-91-R: Ontario English Catholic Teachers' Association (Applicant) v. Renfrew County Roman Catholic Separate School Board (Respondent)

Unit: "all occasional teachers as defined by section 1(1)31 of the Education Act employed by the respondent in the County of Renfrew, save and except persons who, when they are employed as substitutes for other teachers are teachers as defined in the School Boards and Teachers Collective Negotiations Act" (96 employees in unit) (Having regard to the agreement of the parties)

1804-91-R: Office & Professional Employees International Union (Applicant) v. Hearst, Kapuskasing, Smooth Rock Falls Counselling Services (Respondent)

Unit: "all employees of the respondent in the towns of Hearst, Kapuskasing and Smooth Rock Falls, save and except Managers and persons above the rank of manager" (17 employees in unit) (Having regard to the agreement of the parties)

1805-91-R: United Brotherhood of Carpenters & Joiners of America, Local 1256 (Applicant) v. International Cooling Tower Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commer-

cial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

1810-91-R: Ontario Nurses' Association (Applicant) v. Caressant Care Nursing Home of Canada Ltd. (Respondent)

Unit #1: "all registered and graduate nurses employed by the respondent in Fergus, save and except the resident care co-ordinator and persons above the rank of resident care co-ordinator, and registered and graduate nurses regularly employed for not more than 24 hours per week" (2 employees in unit) (Having regard to the agreement of the parties)

Unit #2: "all registered and graduate nurses employed by the respondent in Fergus, regularly employed for not more than 24 hours per week, save and except the resident care co-ordinator and persons above the rank of resident care co-ordinator" (6 employees in unit) (Having regard to the agreement of the parties)

1870-91-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Napanee Public Utilities Commission (Respondent)

Unit: "all office and clerical employees of the respondent Napanee, save and except managers, persons above the rank of manager, students employed during the school vacation period, persons regularly employed for not more than 24 hours per week and persons for whom any trade union held bargaining rights as of September 3, 1991" (2 employees in unit) (Having regard to the agreement of the parties)

1875-91-R: United Steelworkers of America (Applicant) v. LMH Hotel Operations Ltd. c.o.b. Ramada Hotel 400/401 (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and persons for whom any trade union held bargaining rights as of September 3, 1991" (64 employees in unit) (Having regard to the agreement of the parties)

1909-91-R: Service Employees' International Union, Local 204, affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. St. Mark's Support Services for the Physically Challenged Inc. (Respondent)

Unit #1: "all employees of the respondent in the Municipality Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (12 employees in unit) (Having regard to the agreement of the parties)

Unit #2: "all employees of the respondent in the Municipality Metropolitan Toronto, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (11 employees in unit) (Having regard to the agreement of the parties)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0736-91-R: Canadian Union of Public Employees (Applicant) v. The Oxford County Board of Education (Respondent) v. The Oxford County Board of Education Office Employees' Association (Intervener)

Unit: "all office and clerical employees of the Oxford County Board of Education, in the County of Oxford, Ontario, save and except supervisors, persons above the rank of supervisor, secretary to the superintendent of business, secretary to the director of education, affirmative action co-ordinator, persons employed pursuant to a government grant program, students employed during the school vacation period, temporary workers, and persons for whom any trade union held bargaining rights as at October 23, 1989" (98 employees in unit) (Having regard to the agreement of the parties)

Number of persons who cast ballots	90
Number of ballots marked in favour of applicant	76
Number of ballots marked in favour of intervener	14

1332-91-R: Service Employees' International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Shirley Samaroo House of the City of York (Respondent)

Unit #1: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except the Executive Director, persons above the rank of Executive Director, office and clerical staff, and persons regularly employed for not more than 24 hours per week" (21 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on revised voters' list	9
	7
Number of persons who cast ballots	, A
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	2
Ballots segregated and not counted	1

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto employed for not more than 24 hours per week and students employed during the school vacation period, save and except Executive Director, persons above the rank of Executive Director and office and clerical staff" (21 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	21
	9
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	+

1404-91-R: International Union of Operating Engineers, Local 796 (Applicant) v. Hopital Montfort (Respondent)

Unit: "all office and clerical employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, executive assistant to the executive director, executive assistant to the assistant executive director, secretary to health and safety services, paramedical employees, Human Resources technician, Human Resources clerk, staffing officer, and employees in bargaining units for whom any trade union held bargaining rights as of July 19, 1991" (104 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on list as originally prepared by employer	104
Number of names of persons off first as originary property	78
Number of persons who cast ballots	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of ballots marked in favour of applicant	42
	36
Number of ballots marked against applicant	

1618-91-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Brouillette's Manor Ltd. (Respondent) v. Service Employees' Union, Local 210 (Intervener)

Unit: "all employees of the employer at Tecumseh, save and except supervisors and medical staff" (47 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Company of waters' list	48
Number of names of persons on revised voters' list	35
Number of persons who cast ballots	1
Number of spoiled ballots	24
Number of ballots marked in favour of applicant	5
Number of ballots marked in favour of intervener	5
Ballots segregated and not counted	

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1168-91-R: Canadian Union of Public Employees (Applicant) v. The County of Renfrew c.o.b. Miramichi Lodge (Respondent)

Unit: "all employees of the respondent at Pembroke, save and except professional medical staff, graduate nursing staff, undergraduate nurses, technical personnel, office staff, supervisors, persons above the rank of supervisor" (160 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on list as originally prepared by employer	173
Persons struck off list on consent of parties	3
Persons added to list on request of Respondent	6
Number of names of persons on revised voters' list	176
Number of persons who cast ballots	121
Number of ballots marked in favour of applicant	70
Number of ballots marked against applicant	50

Applications for Certification Dismissed Without Vote

1126-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Trafico Masonry Ltd. (Respondent) v. International Union of Bricklayers & Allied Craftsmen, Local 2, Ontario (Intervener) (5 employees in unit)

1775-91-R: United Brotherhood of Carpenters & Joiners of America, Drywall, Acoustics, Lathing & Insulation, Local 675 (Applicant) v. Royal Drywall Systems Inc. (Respondent) (14 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2438-90-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Toyota Canada Inc. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (72 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	72
Number of persons who cast ballots	69
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	39
Ballots segregated and not counted	17

1062-91-R: United Steelworkers of America (Applicant) v. Today's Business Products Ltd. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, technical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (90 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	100
Number of persons who cast ballots	73
Number of ballots marked in favour of applicant	33
Number of ballots marked against applicant	40

Applications for Certification Withdrawn

3458-90-R: International Union of Operating Engineers, Local 793 (Applicant) v. Port Weller Dry Docks, A

- Division of Canadian Ship Building & Engineering Ltd. (Respondent) v. International Brotherhood of Boilermakers, Local 680 (Intervener #1) v. I.B.E.W., Local 303 (Intervener #2)
- 0925-91-R: OSSTF Staff Association (Applicant) v. Ontario Secondary School Teachers' Federation (Respondent) v. Office & Professional Employees International Union (Intervener)
- 1288-91-R: Labourers' International Union of North America, Local 1089 (Applicant) v. Dupont Contracting & Engineering (Respondent)
- 1388-91-R: Labourers' International Union of North America, Local 527 (Applicant) v. M.C.Y. Construction (1989) Ltd. (Respondent)
- 1483-91-R: Ontario Public Service Employees Union (Applicant) v. Gerrard House (Respondent)
- **1540-91-R**; **1800-91-R**: International Brotherhood of Painters & Allied Trades, Local 1904 (Applicant) v. Northland Glass & Metal Ltd. (Respondent) v. Group of Employees (Objectors)
- **1565-91-R:** Sheet Metal Workers' International Association, Local 397 (Applicant) v. Marfin Contracting Inc. (Respondent)
- 1686-91-R: United Steelworkers of America (Applicant) v. Ramada Hotel 400/401 (Respondent)
- 1706-91-R: Canadian Union of Public Employees (Applicant) v. Lake of the Woods District Hospital (Respondent)
- 1711-91-R: Office & Professional Employees' International Union (Applicant) v. Purolator Courier Ltd. (Respondent)
- 1727-91-R: Can-Ar Transit Operator Association (Applicant) v. Can-Ar Transit Services Division of Tok-makjian Ltd. (Respondent)
- **1802-91-R:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL:CIO:CFL: (Cement Division) (Applicant) v. Canron (Pipe) (Respondent) v. Glass, Molders, Pottery, Plastics & Allied Workers International Union, Local 64 (Intervener)
- **1806-91-R:** United Brotherhood of Carpenters & Joiners of America, Local 1256 (Applicant) v. International Cooling Tower Inc. (Respondent)
- 1858-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. C R D Construction Ltd. (Respondent)
- 1923-91-R; 1950-91-R: International Brotherhood of Painters & Allied Trades, Local 1904 (Applicant) v. Canadian Aluminium Company (Respondent)
- 1928-91-R: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Nu-West Hardwood (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

- **1605-91-FC:** Labourers' International Union of North America, Local 1036 (Applicant) v. The Corporation of the City of Sault Ste. Marie (Respondent) (*Granted*)
- **1694-91-FC:** Ontario Public Service Employees Union (Applicant) v. 510034 Ontario Inc., c.o.b. as Larch Radiological Services (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2230-89-R: Graphic Communications International Union, Local 500M (Applicant) v. Metroland Printing, Publishing & Distributing and The Mississauga News (Respondents) (*Granted*)

1236-90-R: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. AMAC Masonry Ltd., Uni-Tri Masonry Ltd., Elgi Masonry Ltd., Uni-Tri Masonry (1989) Ltd., and Bricknology Masonry Ltd., Vercillo Brothers Masonry Ltd., Scenic Masonry Ltd. (Respondents) (Withdrawn)

2132-90-R: International Brotherhood of Painters & Allied Trades, Local 1590 (Applicant) v. 715329 Ontario Ltd. c.o.b. as Gallant Painting and 615823 Ontario Inc. c.o.b. as Lindsay Maintenance Services Painting Division (Respondents) (*Granted*)

2713-90-R: Laundry & Linen Drives and Industrial Workers Union, Teamsters Local 847, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Sealy Upholstery Canada Inc. and/or Price Waterhouse Ltd. and/or William Stuart Nathanson c.o.b. as Brighton Furniture and/or Nopans Ventures Ltd. and/or 883727 Ontario Inc. (Respondents) (Withdrawn)

0973-91-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. 712917 Ontario Inc. c.o.b. as Aldoma Steel and Marco Structure Ltd. (Respondent) (*Dismissed*)

1351-91-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 607 (Applicants) v. Jonroy Equipment Rentals Ltd. and 539660 Ontario Inc. (Respondents) (*Dismissed*)

1569-91-R: Sheet Metal Workers' International Association, Local 30 (Applicant) v. G. Hammer Mechanical Ltd. and D. Zentil Mechanical Ltd. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

2230-89-R: Graphic Communications International Union, Local 500M (Applicant) v. Metroland Printing, Publishing & Distributing and The Mississauga News (Respondents) (*Granted*)

1236-90-R: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. AMAC Masonry Ltd., Uni-Tri Masonry Ltd., Elgi Masonry Ltd., Uni-Tri Masonry (1989) Ltd., and Bricknology Masonry Ltd., Vercillo Brothers Masonry Ltd., Scenic Masonry Ltd. (Respondents) (Withdrawn)

2132-90-R: International Brotherhood of Painters & Allied Trades, Local 1590 (Applicant) v. 715329 Ontario Ltd. c.o.b. as Gallant Painting and 615823 Ontario Inc. c.o.b. as Lindsay Maintenance Services Painting Division (Respondents) (*Granted*)

2713-90-R: Laundry & Linen Drives and Industrial Workers Union, Teamsters Local 847, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Sealy Upholstery Canada Inc. and/or Price Waterhouse Ltd. and/or William Stuart Nathanson c.o.b. as Brighton Furniture and/or Nopans Ventures Ltd. and/or 883727 Ontario Inc. (Respondents) (Withdrawn)

3005-90-R: The Toronto Hospital (Applicant) v. The Ontario Nurses' Association (Respondent) (Dismissed)

0056-91-R: United Steelworkers of America (Applicant) v. 596256 Ontario Ltd. c.o.b. as Instal Fab and Axel Ulrich Contracting Ltd., o/a Commercial Glass & Aluminum - and - Ernst & Young Inc. - and - Dunwoody Ltd. (Respondents) v. International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Intervener) (Withdrawn)

0974-91-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. 712917 Ontario Inc. c.o.b. as Aldoma Steel and Marco Structure Ltd. (Respondent) (*Dismissed*)

1351-91-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 607 (Applicants) v. Jonroy Equipment Rentals Ltd. and 539660 Ontario Inc. (Respondents) (*Dismissed*)

1356-91-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. Hotel Admiral Ltd. c.o.b. as Radisson Plaza Hotel Admiral Toronto-Harbourfront & Carlson Marketing Group Ltd. c.o.b. as Radisson Hotels of Canada (Respondents) (Granted)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3438-90-R; 0294-91-R: Tulsie Persaud Sukhnanden and David Docherty (Applicants) v. United Steelworkers of America (Respondent) v. Knape & Vogt Canada Inc. (Intervener)

Unit: "all employees of the Company in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, assistant supervisors, office, sales and clerical staff, temporary employees and students employed during the school summer vacation period" (69 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	69
	68
Number of persons who cast ballots	32
Number of ballots marked in favour of respondent	36
Number of ballots marked against respondent	50

0757-91-R: Anna Venditti (Applicant) v. United Food & Commercial Workers International Union, Local 393W (Respondent) v. T.C.C. Bottling Ltd. (Intervener)

Unit: "all office employees of T.C.C. Bottling Ltd. at 81 Turnberry Ave., Toronto, Ontario, save and except persons employed in the Area Office, persons employed in the quality assurance department, confidential secretary to the general manager, confidential secretary to the sales manager, confidential secretary to the office manager, assistant office manager, office manager, customer service representatives, plant supervisors and sales supervisors, persons above the rank of plant supervisor, sales supervisor or office manager and employees in bargaining units for which any trade union held bargaining rights as of March 22, 1985" (13 employees in unit) (*Granted*)

s and list as an interest by employer	13
Number of names of persons on list as originally prepared by employer	12
Number of persons who cast ballots	3
Number of ballots marked in favour of respondent	9
Number of ballots marked against respondent	7

1208-91-R: Ed Farrow (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. Vissers Nursery (Intervener) (4 employees in unit) (*Granted*)

1353-91-R: Dave Allen, Wesley Lane and Robin Roberts (Applicants) v. Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Respondent) v. Lock-Wood Ltd. (Intervener) (Withdrawn)

1369-91-R; 1386-91-R: Tony Rosati and Mary Nikou (Applicants) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC: and its Local 1000 (Respondents) v. Regis Corporation - Seligman & Latz of Polo Park (Intervener) (2 employees in unit) (*Dismissed*)

1423-91-R: Krista Ryan and fellow employees (Applicants) v. Service Employees Union, Local 183 (Respondent) v. Famous Players Inc. (Place de Ville Cinemas) (Intervener) (15 employees in unit) (*Granted*)

1425-91-R: Christopher Basden (Applicant) v. International Brotherhood of Electrical Workers, AFL-CI(). CFL, Local 773 (Respondent) v. Waffle's Electric Ltd. (Intervener)

Unit: "all servicemen, motor winders, repairmen, machinists, transformer winders, truck drivers and apprentices employed by Waffle's Electric Ltd." (15 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	18
Number of persons who cast ballots	13
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	11

1624-91-R: The Riverside Hospital of Ottawa (Applicant) v. Canadian Union of Operating Engineers & General Workers, Local 101 (Respondent) (*Withdrawn*)

1651-91-R: Beverley Connell (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) (*Withdrawn*)

1842-91-R: Michael R. Melvin, Employee of the Ontario Ironworkers/Rodmen Benefit Plan Administrators Inc. (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) (12 employees in unit) (*Dismissed*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3062-89-U: Ontario Nurses' Association (Complainant) v. The Board of Health of the Eastern Ontario Health Unit (Respondent) (*Withdrawn*)

3286-89-U: Graphic Communications International Union, Local 500M (Complainant) v. Harlequin Enterprises Limited through its Divisions The Mississauga News and Metroland Printing Publishing and Distributing (Respondent) (*Dismissed*)

0796-90-U: William H. Gazer (Complainant) v. Hotels, Clubs, Restaurants, Taverns Employees' Union, Local 261 (Respondent) (Withdrawn)

0864-90-U: IWA-Canada, Local 2693 (Complainant) v. Atway Transport Inc.(Respondent) (Withdrawn)

0865-90-U: IWA-Canada, Local 2693 (Complainant) v. Atway Transport Inc. (Respondent) (Withdrawn)

0870-90-U: United Food & Commercial Workers International Union, Local 175 AFL-CIO-CLC (Complainant) v. Royce Dupont Poultry Packers (Respondent) (*Withdrawn*)

1521-90-U; **2601-90-U**: Massood Ghofraniha (Complainant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC: and its Local 1688 The Ontario Taxi Association, Julian Taxi Cab Ltd. and 905827 Ontario Ltd. o/a A-1 Taxi (Respondents) (*Dismissed*)

1615-90-U: Service Employees' Union, Local 210, (Complainant) v. Heritage Living Centres Ontario Inc. (o/a Malcolm Place Retirement Residence) (Respondent) (Withdrawn)

2432-90-U: United Food and Commercial Workers International Union, Local 175 (Complainant) v. Thrifty Canada Ltd. c.o.b. as Thrifty Car Rental (Respondent) (Withdrawn)

3056-90-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Thrifty Canada Ltd. c.o.b. as Thrifty Car Rental (Respondent) (Withdrawn)

3186-90-U: Bertrand F. Bennett (Complainant) v. United Brewers Warehousing Workers Provincial Board (Respondent) v. Brewers Retail Inc. (Intervener) (Withdrawn)

3390-90-U: Service Employees Union, Local 183 (Complainant) v. Ernst & Young Inc. Receiver and Manager of Centre Hastings Nursing Homes Ltd. (c.o.b. Deloro Retirement Home) (Respondent) (Granted)

- **3391-90-U:** Service Employees Union, Local 183 (Complainant) v. Ernest & Young Inc. Receiver and Manager of 674738 Ontario Ltd. (c.o.b. Rubidge Hall Retirement Home) (Respondent) (*Granted*)
- 0048-91-U: Labourers' International Union of North America, Local 1081 (Complainant) v. Fly-Form Inc. (Respondent) (Withdrawn)
- **0210-91-U:** Margaret J. White (Complainant) v. The Canadian Union of Public Employees, Local 1022 (Respondent) (*Withdrawn*)
- 0328-91-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Complainant) v. National Grocers Co. Ltd. (Respondent) (Withdrawn)
- **0452-91-U:** United Food & Commercial Workers International Union, Local 175 (Complainant) v. Walfoods Limited (Respondent) (*Withdrawn*)
- 0585-91-U: Joao Santos (Complainant) v. United Steelworkers of America, Local 7574 (Respondent) v. AIMCO, a Division of ITT Industries of Canada Limited (Intervener #1) v. Group of Employees, (Intervener #2) (Dismissed)
- **0730-91-U:** Penny Legacy (Complainant) v. O.P.E.I.U. Local 267 (President) Joyce McCabe (Respondent) v. Domtar Inc. Packaging Group Containerboard Division (Intervener) (*Withdrawn*)
- **0856-91-U:** Jeanine M. Anderson (Complainant) v. London & District Service Worker's Union, Local 220 (Respondent) v. Kitchener-Waterloo Hospital (Intervener) (*Withdrawn*)
- **0934-91-U:** Canadian Union of Public Employees L-3173 (Complainant) v. Community Information Centre of Metropolitan Toronto (Respondent) (*Withdrawn*)
- **1167-91-U:** Office & Professional Employees, International Union, Local 343 (Complainant) v. The Ontario Secondary School Teachers' Federation (Respondent) (*Withdrawn*)
- 1192-91-U: The Association of Allied Health Professionals: Ontario (Complainant) v. Toronto East General and Orthopaedic Hospital (Respondent) (Withdrawn)
- 1223-91-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Complainant) v. The Hudson's Bay Company (Respondent) (Withdrawn)
- 1234-91-U: Canadian Union of Public Employees and its Local 2210 (Complainant) v. The Regional Municipality of Haldimand-Norfolk (Respondent) (Withdrawn)
- 1260-91-U: Tom Kwok Chan, James Semchyschyn, Carlton Somers (Complainant) v. Hotel Employees, Restaurant Employees Union, Local 75 (Respondent) (Withdrawn)
- 1290-91-U: Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employees' & Bartenders' International Union (Complainant) v. 623230 Ontario Inc. cob as Caddy's Lounge (Respondent) (Withdrawn)
- **1299-91-U:** Laundry & Linen Drivers & Industrial Workers, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Cleanwear Uniform Service Inc. c.o.b. as Independent Linen Service (Respondent) (*Withdrawn*)
- **1307-91-U:** United Food & Commercial Workers International Union, Local 175 (Complainant) v. 900501 Ontario Limited c.o.b. as Loeb IGA (Respondent) (*Withdrawn*)
- **1311-91-U:** United Brotherhood of Carpenters & Joiners of America, Local Union 93 (Complainant) v. Bellai Bros. Ltd. (Respondent) (*Withdrawn*)

- 1315-91-U: Peter & Darlene Rombeiro (Complainants) v. Local 105 (Union), Jim White and George High (Respondents) (Withdrawn)
- 1325-91-U: Employees of Joseph Brant Hospital Registered Nursing Assistants, Obstetrical Unit (Complainant) v. Canadian Union of Public Employees, Local 1065 (Respondent) (Withdrawn)
- 1343-91-U: Canadian Brotherhood of Railway, Transport and General Workers (Complainant) v. The Corporation of the City of Sarnia-Clearwater (Respondent) (Withdrawn)
- 1391-91-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Complainant) v. 366838 Ontario Limited c.o.b. as City-Wide Taxi (Respondent) (Withdrawn)
- 1396-91-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. 900501 Ontario Limited c.o.b. as Loeb IGA (Respondent) (Withdrawn)
- 1435-91-U: International Brotherhood of Electrical Workers, Local 353 (Complainant) v. S. Webber Electric Ltd. (Respondent) (Withdrawn)
- 1437-91-U: United Steelworkers of America (Complainant) v. IKO Industries Ltd. (Respondent) (Withdrawn)
- **1463-91-U:** International Brotherhood of Electrical Workers, Local 636 (Complainant) v. The Regional Municipality of Halton (Respondent) (*Withdrawn*)
- 1479-91-U: Wendy Knelsen (Complainant) v. Presstran Industries A Division of Magna Int. & June Turkington Human Resources Manager (Respondents) (Withdrawn)
- **1497-91-U:** United Food & Commercial Workers International Union, AFL:CIO:CLC: (Complainant) v. Diner's Delite Foods Limited (Respondent) (*Withdrawn*)
- 1499-91-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC: (Complainant) v. Longo Brothers Fruit Market Inc. c.o.b. Longo's Fruit Market (Respondent) (Withdrawn)
- 1534-91-U: Marilyn Ceccato (Complainant) v. CUPE Local 1263 (Respondent) (Withdrawn)
- 1571-91-U: John Clark (Complainant) v. U.F.C.W. Local 175-633 and Jim Crocket (Respondents) (Withdrawn)
- **1582-91-U:** Azim Babu Ramji (Complainant) v. Royal York Hotel and Hotel & Restaurant Local 75 (Respondents) (*Withdrawn*)
- 1583-91-U: Claire-Lise Beauchesne (Complainant) v. Office and Professional Employees International Union Local 343 (Respondent) v. United Food & Commercial Workers International Union (Intervener) (Withdrawn)
- 1645-91-U: Mr. Stephane Verreault (Complainant) v. Chief Steward Henri Corman (Respondent) (Withdrawn)
- **1653-91-U:** Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Complainant) v. York Lathing & Drywall Ltd. (Respondent) (*Withdrawn*)
- **1654-91-U:** Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Complainant) v. Florida Drywall Co. Ltd. (Respondent) (*Withdrawn*)
- 1656-91-U: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Complainant) v. Broneff Contractors Inc. (Respondent) (Withdrawn)

- **1658-91-U:** Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Complainant) v. Eldom Drywall (Respondent) (*Withdrawn*)
- **1659-91-U:** Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Complainant) v. 4 Star Drywall (Respondent) (*Withdrawn*)
- **1660-91-U:** Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Complainant) v. City Wide Drywall Systems Limited (Respondent) (*Withdrawn*)
- **1662-91-U:** Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Complainant) v. 410385 Ontario Limited c.o.b. as Maple Drywall (Respondent) (*Withdrawn*)
- **1663-91-U:** Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Complainant) v. Mose Drywall Services Ltd. (Respondent) (*Withdrawn*)
- **1664-91-U:** Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Complainant) v. Spring Plastering Limited (Respondent) (*Withdrawn*)
- **1673-91-U:** United Food & Commercial Workers International Union, AFL-CIO-CLC (Complainant) v. 900501 Ontario Limited c.o.b. as Loeb IGA (Respondent) (*Withdrawn*)
- 1700-91-U: Rodney McGill (Complainant) v. Chrysler Canada (Acustar) and C.A.W., Local 1459, (Respondents) (Withdrawn)
- 1717-91-U: United Steelworkers of America (Complainant) v. Maxville Manor (Respondent) (Withdrawn)
- 1731-91-U United Steelworkers of America (Complainant) v. Wiresmith Limited (Respondent) (Dismissed)
- 1769-91-U: Members of SEIU Local 210 Service Dept. Learnington Hospital (Complainant) v. SEIU Local 210, Windsor, Ont. (Respondent) (Withdrawn)
- 1795-91-U: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Complainant) v. Nelmar Drywall (Respondent) (Withdrawn)
- 1836-91-U; 1844-91-U; 1845-91-U: Robert James Mically (Complainant) v. Board of Governors (Respondent) (Withdrawn)
- 1880-91-U: Raymond Williams (Complainant) v. Delta Chelsea Inn, Local 75 (Respondent) (Withdrawn)

JURISDICTIONAL DISPUTES

- **2875-90-JD:** Ford Electronics Manufacturing Corporation (Complainant) v. International Association of Machinists and Aerospace Workers, Local Lodge 2113 (Respondent) (*Withdrawn*)
- **0865-91-JD:** Robert Globe Electrical & Mechanical Ltd. (Complainant) v. Sheet Metal Workers' International Association, Local 537 and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Respondents) v. Ontario Sheet Metal and Air handling Group (Intervener) (*Withdrawn*)
- **0996-91-JD:** United Brotherhood of Carpenters & Joiners of America, Local 18 (Complainant) v. Labourers International Union of North America, Local 837 and Canrose Drywall Co. Ltd. and Eton Construction Ltd. (Respondents) (*Withdrawn*)
- **1898-91-JD:** The Association of Allied Health Professionals: Ontario (Applicant) v. The Board of Health for the Peterborough County-City Health Unit (Respondent) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1626-90-M: City of Port Colborne (Applicant) v. Canadian Union of Public Employees (Respondent) (Dismissed)

0234-91-M: The Corporation of the City of Barrie (Applicant) v. Canadian Union of Public Employees, Local 2380 (Respondent) (*Withdrawn*)

0542-91-M: The Regional Municipality of Ottawa-Carleton (Applicant) v. The Civic Institute of Professional Personnel of Ottawa-Carleton (Respondent) (*Dismissed*)

1166-91-M: Office & Professional Employees, International Union, Local 343 (Applicant) v. The Ontario Secondary School Teachers' Federation (Respondent) (Withdrawn)

1250-91-M: Canadian Union of Public Employees (Applicant) v. Perth District Health Unit (Respondent) (Dismissed)

1560-91-M: The Association of Allied Health Professionals: Ontario (Applicant) v. The Board of Health for the Peterborough County-City Health Unit (Respondent) (*Dismissed*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0535-91-OH: The International Association of Machinists and Aerospace Workers, Local Lodge 171 and Tim Mott (Complainant) v. Fleet Industries and Doug Marr (Respondent) (*Withdrawn*)

0656-91-OH: W.R. Huffman, U.S.W.A. Local 8782 (Complainant) v. Stelco Steel Lake Erie Works (Respondent) (Withdrawn)

0851-91-OH: Robert St. Jean (Complainant) v. Inco Limited, Copper Refinery, Electrowinning Department, Foreman - Ken Cox (Control room) (Respondent) (*Withdrawn*)

1553-91-OH: Kevin G. Cook (Complainant) v. Riverside Custom Collision Windsor, Ont. (Respondent) (Withdrawn)

1572-91-OH: Dodridge Beckford, Wayne Davis and Walter Soo (Complainants) v. Nelson Canada - A Division of International Thomson Ltd. (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

2917-89-G: The Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Perfer Bricklayers Masonry Ltd. (Respondent) (*Granted*)

2493-90-G: The Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Connect Masonry (Respondent) (*Granted*)

3206-90-G; **3207-90-G**; **3208-90-G**: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Studeon Drywall & Acoustics Ltd. (Respondent) (*Granted*)

3355-90-G: International Brotherhood of Electrical Workers, Local 402 (Applicant) v. Prezio Electric Ltd. (Respondent) (Dismissed)

0154-91-G: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Michael Potter Roofing (Respondent) (Granted)

- **0186-91-G:** Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Joe Arban Contractor (Respondent) (*Granted*)
- **0265-91-G:** Sheet Metal Workers' International Association, Local 537 (Applicant) v. Robert Globe Electrical & Mechanical Ltd. (Respondent) (*Withdrawn*)
- **0266-91-G:** Sheet Metal Workers' International Association, Local 537 (Applicant) v. Robert Globe Electrical & Mechanical Ltd. (Respondent) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Intervener) (*Withdrawn*)
- **0271-91-G:** United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. J.R. Noel Plastering Ltd. (Respondent) (*Withdrawn*)
- **0341-91-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Black & McDonald Ltd. (Respondent) v. IBEW Construction Council of Ontario and International Brotherhood of Electrical Workers, Local 353 (Interveners) (*Withdrawn*)
- 0367-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. The SNC Group (Respondent) (Dismissed)
- **0380-91-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. A.M.L. Advanced Management Ltd. (c.o.b. as Corpcon) (Respondent) (*Granted*)
- **0521-91-G:** Teamsters Local Union 91 (Applicant) v. Dufresne Piling Company (1967) Ltd. (Respondent) (Withdrawn)
- **0556-91-G:** Labourers' International Union of North America, Local 837 (Applicant) v. Eton Construction Ltd. (Respondent) (*Withdrawn*)
- **0777-91-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. 712917 Ontario Inc. c.o.b. as Aldoma Steel & Marco Structure Ltd. (Respondent) (*Dismissed*)
- **0919-91-G:** International Brotherhood of Painters & Allied Trades, Local 1819 Glaziers (Applicant) v. Scullion Glass (Ontario) Ltd. (Respondent) (*Granted*)
- 1031-91-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Douglas MacDonald Development Corporation, Douglas Ronald MacDonald, David Colin Anderson and David Victor Spillenaar (Respondent) (*Granted*)
- 1085-91-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. 4 Star Drywall (Respondent) (Granted)
- 1087-91-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Eldom Drywall (Respondent) (Granted)
- 1088-91-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. City Wide Drywall Systems Ltd. (Respondent) (*Granted*)
- 1161-91-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Van Horne Construction Ltd. (Respondent) (*Granted*)
- 1217-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Tilly Lake Construction Ltd. (Respondent) (*Granted*)
- 1231-91-G: Labourers' International Union of North America, Local 527 (Applicant) v. R. J. Nicol Construction (Respondent) (Withdrawn)

- 1312-91-G; 1493-91-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Bellai Bros. Ltd. (Respondent) (Withdrawn)
- 1336-91-G: Ontario Allied Construction Trades Council (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro (Respondent) (Withdrawn)
- 1352-91-G: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 607 (Applicants) v. Jonroy Equipment Rentals Ltd. and 539660 Ontario Inc. (Respondents) (*Granted*)
- 1384-91-G: International Brotherhood of Painters & Allied Trades, Local 1795 Glaziers (Applicant) v. Universal Glass & Aluminum (Respondent) (*Dismissed*)
- **1489-91-G:** United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 71 (Applicant) v. Comstock Canada (Respondent) (*Granted*)
- 1602-91-G: Labourers' International Union of North America, Local 506 (Applicant) v. Ellis-Don Ltd. (Respondent) (Withdrawn)
- 1667-91-G: International Union of Elevator Constructors, Local 90 (Applicant) v. Armor Elevator Wentworth Ltd. (Respondent) (Granted)
- **1696-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. C.W. West Crane Service Ltd. (Respondent) (*Granted*)
- 1697-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Drainex Construction Ltd. (Respondent) (*Granted*)
- 1698-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Smith Bros. Excavating (Windsor) Ltd. (Respondent) (*Granted*)
- 1729-91-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Fitter Welding Inc. (Respondent) (Withdrawn)
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- 1737-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. John Maggio Excavating Ltd. (Respondent) (*Granted*)
- 1748-91-G: Labourers' International Union of North America, Ontario Provincial District Council and its Affiliated Local Unions, Labourers' International Union of North America, Local 1059 & 1081 (Applicants) v. Pickard Construction Co. Ltd. (Respondent) (*Granted*)
- 1754-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Pit-On Construction Co. Ltd. (Respondent) (*Granted*)
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- 1756-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Cana Drain Services Inc. (Respondent) (Granted)
- 1763-91-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Montgomery Kone Elevator Company (Respondent) (Withdrawn)

- 1771-91-G: Labourers' International Union of North America, Local 506 (Applicant) v. Baseform Construction Ltd. and Formanti Structures Ltd. (Respondents) (*Granted*)
- 1776-91-G: Labourers' International Union of North America, Local 1036 (Applicant) v. R. M. Belanger Construction Ltd. (Respondent) (Withdrawn)
- 1783-91-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. York Lathing & Drywall Ltd. (Respondent) (*Granted*)
- 1784-91-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. 410385 Ontario Ltd. c.o.b. as Maple Drywall (Respondent) (*Granted*)
- 1785-91-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Broneff Contractors Inc. (Respondent) (*Granted*)
- 1790-91-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Florida Drywall Co. Ltd. (Respondent) (*Granted*)
- 1791-91-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Spring Plastering Ltd. (Respondent) (Granted)
- 1792-91-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Mose Drywall Services Ltd. (Respondent) (*Granted*)
- 1794-91-G: Drywall, Acoustic, Lathing & Insulation, Local 675 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Nelmar Drywall (Respondent) (*Granted*)
- **1818-91-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Belor Construction Ltd. (Respondent) v. Operative Plasterers' & Cement Masons' International Association, Local No. 172 (Intervener) (*Granted*)
- **1820-91-G:** Labourers' International Union of North America, Local 183 (Applicant) v. B. C. Shotcrete Ltd. (Respondent) (*Withdrawn*)
- **1855-91-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Deccon Developments Ltd. (Respondent) (*Granted*)
- **1857-91-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Melas Caulking Co. (Respondent) (*Granted*)
- **1860-91-G:** Gjehub Mechanical Contractors Ltd. (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Respondent) (Withdrawn)
- **1867-91-G:** Construction Workers, Local 6 Affiliated with the Christian Labour Association of Canada (Applicant) v. Steele Electric Inc. (Respondent) (*Withdrawn*)
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- **1883-91-G:** International Union of Elevator Constructors, Local 50 (Applicant) v. Schindler Elevator Corp. (Respondent) (*Withdrawn*)

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- 1886-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. R.O.M. Contractors Inc. o/a Ross-Clair Contractors (Respondent) (*Granted*)
- **1897-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Cooper's Crane Rental Ltd. (Respondent) (*Withdrawn*)
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- 1922-91-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada (Applicant) v. Gjehub Mechanical Contractors Ltd. (Respondent) (*Granted*)
- 1925-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Pacer Panel Systems Inc. (Respondent) (*Granted*)
- 1953-91-G: Labourers' International Union of North America, Local 625 (Applicant) v. E. Vennettilli & Sons Ltd. (Respondent) (Withdrawn)
- **1960-91-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Amberland Electric Inc. (Respondent) (*Withdrawn*)
- 1966-91-G: Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Rock Construction & Management Ltd. (Respondent) (*Granted*)
- 1976-91-G: United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. P. A. Richens Carpentry (Respondent) (*Granted*)
- **2007-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Pit-On Construction Company Ltd. (Respondent) (*Granted*)
- **2047-91-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Bren Electrical Contractors (Respondent) (*Withdrawn*)

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- 0144-90-R; 0145-90-R; 2050-90-R; 2051-90-R: Teamsters, Local 419 (Applicant) v. 176218 Canada Inc. c.o.b. Booth Fisheries; and Van Horne Fish Distributors Ontario Ltd. and 167100 Canada Inc. c.o.b. as Groupe La Mer (Respondents) (*Dismissed*)
- 2044-90-U: Marcel Fortin (Complainant) v. Millwright Local, 1425 (Respondent) (Dismissed)
- 1597-91-R: Labourers' International Union of North America, Local 607 (Applicant) v. MNT Builders Ltd. (Respondent) (Dismissed)

Ontario Labour Relations Board, 400 University Avenue, Toronto, Ontario M7A 1V4





ONTARIO LABOUR RELATIONS BOARD REPORTS



November 1991



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ASPEN ALUMINUM LTD.; RE C.J.A., LOCAL 27.....

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1387-91-R Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Applicant v. Aspen Aluminum Ltd., Respondent

Certification - Construction Industry - Voluntary Recognition - Employer submitting that certification application barred by voluntary recognition agreement between applicant union and employer - Board concluding that nothing in sub-section 5(3) of the *Act* prevents the voluntarily recognized union from itself applying for certification during or after first year after recognition agreement entered into - Board finding it unnecessary, therefore, to decide whether agreement was recognition agreement - Certification application not barred

BEFORE: Robert D. Howe, Vice-Chair, and Board Members D. A. MacDonald and N. A. Wilson.

APPEARANCES: J. David Watson, Mike McCreary and Joe Almeida for the applicant; Scott G. Thompson and Mila Foerster for the respondent.

DECISION OF THE BOARD; November 22, 1991

- 1. In a decision dated October 11, 1991, the Board wrote, in part, as follows regarding this application for certification:
 -
 - 2. The respondent initially disputed the applicant's status as a trade union. However, after being advised that the Board had previously found the applicant to be a trade union, respondent's counsel indicated that he would not be pursuing that issue. Accordingly, having regard to the provisions of section 105 of the *Labour Relations Act*, the Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the Act.
 - 3. After hearing and recessing to consider submissions regarding the respondent's contention that this application is barred by an agreement that was entered into by the parties on March 29, 1989, the Board ruled as follows:

A majority consisting of [the Vice-Chair] and Board Member Wilson have concluded that this application is not barred by the agreement dated March 29, 1989, which has been entered as Exhibit 1 in these proceedings. Board Member MacDonald has reserved his decision on this matter. Our reasons for this ruling will issue at a later date.

- • •
- 2. The purpose of this decision is to provide the Board's reasons for that ruling, which has become unanimous as a result of Board Member MacDonald's concurrence. For ease of exposition, the persons whom the applicant seeks to represent are referred to herein as "employees". However, neither our use of that terminology nor anything else in this decision should be taken as expressing any view on the matter of whether those persons are actually employees for purposes of the *Labour Relations Act* (as contended by the applicant) or independent contractors (as contended by the respondent). That issue remains outstanding, and is not addressed by this decision.
- 3. On February 20, 1989, the applicant applied for certification in respect of a bargaining unit substantially similar to the unit for which it seeks certification in the present proceedings. (For ease of reference, the applicant and the respondent are also referred to as the "Union" and the "Company" in this decision.) By decision dated March 15, 1989 regarding that earlier application (File No. 2883-88-R), the Board directed that a pre-hearing representation vote be taken. Shortly

before the date on which that vote was to be conducted, the parties entered into settlement discussions, which resulted in the following agreement (hereinafter referred to as the "Agreement") being signed by representatives of the parties on March 29, 1989:

THIS AGREEMENT dated the 29th day of March, 1989.

BETWEEN:

ASPEN ALUMINUM LTD.

("Aspen")

- and -

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 27

(the "Union")

Aspen and the Union mutually agree as follows:

- 1. The Union agrees to request the leave of the Ontario Labour Relations Board to withdraw its application for certification forming the subject matter of Board File #2883-88-R and request the Board to cancel the representation vote scheduled to take place on March 30, 1989.
- 2. Aspen agrees that the Union is entitled to act for and recognizes the Union as the exclusive bargaining agent for aluminum siding installers of Aspen who are either employees or dependent contractors, save and except non-working supervisors and persons above the rank of non-working supervisor in other than the I.C.I. sector in Board-Area #8; on the following conditions:
 - (a) Aspen and the Union agree not to commence negotiations to make a collective agreement or request the appointment of a concilliation officer or mediator or concilliation board until such time as all of the competitors of Aspen listed in the attached Schedule "A" have been certified or have voluntarily recognized the Union;
 - (b) Aspen and the Union agree that any collective agreement negotiated in the future will not be retroactive and will provide that monetary increases contained in the collective agreement will not apply to work to be performed by aluminum siding installers on contracts between Aspen and any owner or builder which have been agreed to on or before the effective commencement date of the collective agreement until ninety (90) days after the commencement of the collective agreement; and
 - (c) any collective agreement negotiated in the future will recognize the uniqueness of the aluminum siding industry and contain terms and conditions suitable to that industry; and
 - (d) for the purpose of clarity, Aspen and the Union agree that aluminum siding installers do not include up to four (4) employees or dependent contractors who service aluminum siding that has already been installed.

Schedule "A" to the Agreement contains the following five names:

March Aluminum Ltd.
Dominion Sheet Metal & Roofing Works
Manville Aluminum
Canadian Star Aluminum
Hanwell Contracting & Building Products

- 4. It is common ground between the parties that some of the Company's competitors listed in Schedule "A" to the Agreement have not been certified and have not voluntarily recognized the Union. It is also common ground that there have been no negotiations to make a collective agreement between the Union and the Company, and that there has been no request for the appointment of a conciliation officer, mediator, or conciliation board.
- 5. It is the contention of Company counsel that the instant application is barred by the Agreement. He submits, in essence, that the Agreement is a (voluntary) recognition agreement of the type contemplated by sections 16(3) and 5(3) of the Act, and that the latter provision precludes the Union from applying for certification. It is his position that once a trade union has entered into a recognition agreement in respect of a bargaining unit, it can never apply for certification as bargaining agent for any of the employees in the bargaining unit defined in the recognition agreement because section 5(3) only permits "another trade union" to make such application (after the expiration of one year from the date that the recognition agreement was entered into).
- 6. Counsel for the Union, on the other hand, submits that his client is entitled to bring this application by virtue of section 5(1) of the Act. It is his contention that although section 5(3) limits the broad language of section 5(1) to the extent of precluding another trade union from applying for certification as bargaining agent for any of the employees in the bargaining unit defined in the recognition agreement within a year from the date that the recognition agreement was entered into, nothing in section 5(3) precludes the trade union that has entered into a recognition agreement from applying for certification during that first year or at any other time.
- 7. Counsel also made extensive submissions concerning whether or not the Agreement should be found to be a recognition agreement in view of its conditional nature, and concerning whether or not the applicant has abandoned its rights under the Agreement. However, the Board has found it to be unnecessary to address those issues in view of the conclusion that we have reached regarding the interpretation of section 5 of the Act. Thus, for purposes of this decision, we have assumed, without deciding, that the Agreement is a valid recognition agreement, and that there has been no abandonment by the Union.

8. Section 5 of the Act provides as follows:

- 5.-(1) Where no trade union has been certified as bargaining agent of the employees of an employer in a unit that a trade union claims to be appropriate for collective bargaining and the employees in the unit are not bound by a collective agreement, a trade union may, subject to section 61, apply at any time to the Board for certification as bargaining agent of the employees in the unit.
- (2) Where a trade union has been certified as bargaining agent of the employees of an employer in a bargaining unit and has not entered into a collective agreement with the employer and no declaration has been made by the Board that the trade union no longer represents the employees in the bargaining unit, another trade union may, subject to section 61, apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit determined in the certificate only after the expiration of one year from the date of the certificate.
- (3) Where an employer and a trade union agree that the employer recognizes the trade union as the exclusive bargaining agent of the employees in a defined bargaining unit and the agreement is in writing signed by the parties and the parties have not entered into a collective agreement and the Board has not made a declaration under section 60, another trade union may, subject to section 61, apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the recognition agreement only after the expiration of one year from the date that the recognition agreement was entered into.
- (4) Where a collective agreement is for a term of not more than three years, a trade union may,

- subject to section 61, apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement only after the commencement of the last two months of its operation.
- (5) Where a collective agreement is for a term of more than three years, a trade union may, subject to section 61, apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation as the case may be.
- (6) Where a collective agreement referred to in subsection (4) or (5) provides that it will continue to operate for a further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, a trade union may, subject to section 61, apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement during the further term or successive terms only during the last two months of each year that it so continues to operate, or after the commencement of the last two months of its operation, as the case may be.
- Under subsection (1) of that provision, a trade union is permitted, subject to section 61 of the Act, to apply to the Board at any time for certification as bargaining agent of the employees of an employer in a unit that the trade union claims to be appropriate for collective bargaining, where no trade union has been certified as bargaining agent of the employees in that unit and the employees in that unit are not bound by a collective agreement. Section 61, which precludes a certification application from being brought within certain specified periods following conciliation (and mediation), has no application in the circumstances of the instant case because there has been no appointment of a conciliation officer or a mediator. Section 5(2) is also inapplicable as no trade union has been certified as bargaining agent for any of the employees in the bargaining unit for which the applicant seeks certification. Subsections (4), (5), and (6) are also inapplicable because the employees in the bargaining unit are not bound by a collective agreement. This leaves subsection (3), which is the only part of section 5 that expressly addresses voluntary recognition. Although we recognize that section 5(1) is limited by section 5(3) in the context of a recognition agreement, we do not agree that the latter limits the former to the extent suggested by respondent's counsel. Where a trade union and an employer sign a recognition agreement in respect of a bargaining unit, section 5(3) precludes any other trade union from applying for certification as bargaining agent of any of the employees in that bargaining unit within one year from the date the recognition agreement was entered into. (See, for example, J. C. Milne Const. Co. (Canada) Inc., [1979] OLRB Rep. March 220.) Thus, it gives the voluntarily recognized trade union a year in which to seek to obtain a collective agreement without risk of being displaced by another trade union (unless another trade union makes a successful application under section 60 of the Act and thereby obtains a declaration that the voluntarily recognized trade union was not entitled to represent the employees in the bargaining unit at the time the recognition agreement was entered into). However, nothing in section 5(3) prevents the voluntarily recognized trade union from itself applying for certification during (or after) that first year. Thus, unless the application is precluded by section 61 (where a conciliation officer or mediator has been appointed) or by subsections (4), (5), or (6) of section 5 (where the voluntarily recognized trade union has entered into a collective agreement), a trade union that has entered into a recognition agreement with an employer in respect of a defined bargaining unit is at liberty to apply to the Board for certification as bargaining agent for that unit.
- 10. That result not only flows clearly from the language of section 5 of the Act, but also makes "good labour relations sense" in the context of the Act read as a whole. While it might ini-

tially appear that a trade union which has obtained voluntary recognition would have no need for a certificate, a careful review of the Act discloses that voluntary recognition is not always equivalent to certification.

- 11. A voluntarily recognized trade union is susceptible to an application under section 60 for a period of one year. That section provides as follows:
 - 60.-(1) Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 16(3), the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.
 - (2) Before disposing of an application under subsection (1), the Board may make such inquiry, require the production of such evidence and the doing of such things, or hold such representation votes, as it considers appropriate.
 - (3) On an application under subsection (1), the onus of establishing that the trade union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into rests on the parties to the agreement.
 - (4) Upon the Board making a declaration under subsection (1), the trade union forthwith ceases to represent the employees in the defined bargaining unit in the recognition agreement or collective agreement and any collective agreement in operation between the trade union and the employer ceases to operate forthwith in respect of the employees affected by the application.

(See, for example, Pry-Con Construction Inc., [1988] OLRB Rep. July 698.)

12. In addition to being susceptible to a section 60 application, a voluntary recognized trade union which has not entered into a collective agreement with the employer has no right to give the employer written notice of its desire to bargain with a view to making a collective agreement. The right (and the obligation) to give such notice derives from section 14 of the Act, which provides:

Following certification, the trade union shall give the employer written notice of its desire to bargain with a view to making a collective agreement. [emphasis added]

Since it is the giving of that notice (or of renewal notice under section 53) that triggers the section 15 duty to "bargain in good faith and make every reasonable effort to make a collective agreement", a voluntarily recognized trade union which has not entered into a collective agreement does not fall within the scope of section 15 and, accordingly, cannot legally compel the employer to meet with it, nor to bargain in good faith and make every reasonable effort to make a collective agreement.

13. Moreover, unlike a certified trade union, a voluntarily recognized trade union which has not entered into a collective agreement does not have access as of right to conciliation. A certified trade union's right to conciliation flows from section 16(1) of the Act, which provides:

Where notice has been given under section 14 or 53, the Minister, upon the request of either party, *shall* appoint a conciliation officer to confer with the parties and endeavour to affect a collective agreement. [emphasis added]

In contrast with that mandatory provision is the following discretionary provision which applies in the context of voluntary recognition:

16(3) Where an employer and a trade union agree that the employer recognizes the trade union as the exclusive bargaining agent of the employees in a defined bargaining unit and the agreement is in writing signed by the parties, the Minister *may*, upon the request of either party, appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement. [emphasis added]

Furthermore, if a voluntarily recognized trade union's request for conciliation is denied under section 16(3), it will be precluded from applying to the Board under section 40a for first agreement arbitration: see section 40a(1), which makes exhaustion of the conciliation process a condition precedent to such application.

As indicated by respondent's counsel in his thorough submissions, the Board has had occasion to dismiss certification applications where an applicant already has bargaining rights for the bargaining unit for which it seeks to be certified: see, for example, *Beer Precast Concrete Limited*, [1970] OLRB Rep. Nov. 844; *C & T Reinforcing Steel Co. Ltd.*, [1969] OLRB Rep. Nov. 983; and *Northern Electric Company Limited*, 63 CLLC 1192. However, in each of those cases, the trade union's bargaining rights had been in existence for more than a year and were based upon a recognition clause contained in a collective agreement. In that context, we respectfully agree with the following reasoning from the *Northern Electric* case, which has been applied in subsequent cases:

Having regard to the fact that there is a subsisting bargaining relationship between the applicant and the respondent for the employees for whom the applicant now seeks to be certified as bargaining agent, and for the reasons for the decision of the Board in *Loblaw Groceterias Company Limited, Hamilton, Ontario Case*, (1944) D.L.S. 7-1115, the Board finds that no purpose would be served by processing this application further due to the fact that a certificate of the Board cannot add one iota of legality or sanctity to the bargaining relationship between the parties, nor can it add more status to the applicant as bargaining agent because in the circumstances of this case, the bargaining rights flowing from the collective agreement are of equal weight to the bargaining rights which would flow from a certificate of the Board for this applicant.

In view of these circumstances ... the Board is of the opinion that the applicant has failed to make a prima facie case for the remedy requested and the application is therefore dismissed.

[emphasis added]

However, for the reasons set forth above, that reasoning does not apply to a voluntarily recognized trade union which has not entered into a collective agreement with the employer.

15. For the foregoing reasons, we are unanimously of the view that this application falls within the purview of section 5(1) of the *Labour Relations Act*, and is not barred by the Agreement.

2306-91-G Sheet Metal Workers' International Association, Local 537, Applicant v. The Electrical Power Systems Construction Association, **Bechtel Canada Inc.**, Respondents v. United Brotherhood of Carpenters and Joiners of America, Local 18, Intervener

Adjournment - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Practice and Procedure - Board adjourning section 124 proceeding to allow any of the parties to file jurisdictional dispute within thirty days - In the event a jurisdictional dispute is filed, the section 124 application to be listed together with that dispute and both to proceed together

BEFORE: Robert Herman, Vice-Chair, and Board Members W. H. Wightman and C. A. Ballentine.

APPEARANCES: S.B.D. Wahl and N. Agnew for the applicant; Patrick Moran, Dawn Laird, Grant Brooks, Don Lyons for the respondents; Harold F. Caley and Bud Calligan for the intervener.

DECISION OF THE BOARD; November 13, 1991

- 1. This is an application pursuant to section 124 of the *Labour Relations Act*.
- 2. After entertaining the submissions of the parties, the Board delivered the following oral ruling:

The grievance before us has two parts. The applicant first asserts that through an assignment of work which resulted from a mark-up meeting in September, 1990, the applicant was assigned work which is currently being done by the intervener Carpenters, commencing as of September, 1991. In the alternative, the applicant asserts that a meeting convened by the respondent, Bechtel Canada Inc. in September, 1991, was not a proper mark-up meeting, in breach of the collective agreement. Implicit, or perhaps explicit in the wording of the grievance, that meeting resulted in a wrongful assignment of certain work to the intervener.

However crafted, the grievance in question is over work which is now being done, as of September, 1981. An indication of this is that no grievance was filed after the mark-up meeting of September, 1990, but only after the work commenced in September, 1991. In a sense, this work is the work in dispute.

If we were to hear the grievance first, then insofar as the assignment resulting from the mark-up meeting of September, 1990 was concerned, the issue would be whether the work now being performed was in fact work assigned in that assignment. Given the nature of this aspect of the grievance, and given the remedies specifically sought by the applicant, the interests of the Carpenters are clearly involved in the resolution of those issues. At the same time, to answer the question whether there is a breach with respect to this aspect of the grievance would not necessarily solve the dispute among the parties. Neither would an answer to the second branch of the grievance, whether the company failed to hold a proper mark-up meeting in September, 1991. And with respect to this second alternative branch of the grievance, in

any phase of the proceeding dealing with remedies, again the interests of the Carpenters might well be involved.

Since this dispute is in essence a dispute over the work now being performed, it appears that it is really at least in part a union - union dispute, with the interests of the Carpenters involved for at least significant parts of what would constitute the section 124 proceeding. In these circumstances, the Board considers it more appropriate to adjourn the section 124 application, to allow the parties to file a jurisdictional dispute pursuant to section 91 of the Act. This application will therefore be adjourned, on the basis that it is to be listed together with any jurisdictional dispute that is subsequently filed, rather than the application being deferred until a decision issues in any jurisdictional complaint. In this fashion, the real work dispute can be resolved among the three parties, while at the same time providing an opportunity to also litigate the section 124 issues which do not involve the resolution of the work assignment dispute *per se*.

Accordingly, this matter is adjourned, to allow any of the parties to file a jurisdictional dispute, within thirty days of November 7, 1991. In the event such a dispute is filed, the instant section 124 application will be listed together with that dispute, and both will proceed together. The panel which ultimately deals with the jurisdictional dispute can decide whether or how to procedurally deal with the two matters, and how to decide the issues before it.

If no jurisdictional dispute is filed by the above deadline, this section 124 application will be re-scheduled for hearing.

0333-91-R; 0785-91-U Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. Ben Bruinsma and Sons Limited (Province of Ontario), Respondent v. Construction Workers Local 53, Christian Labour Association of Canada, Intervener; Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 625, Complainant v. Ben Bruinsma and Sons Limited, and Christian Labour Association of Canada, Construction Workers' Local 53, Respondents

BEFORE: S. Liang, Vice-Chair, and Board Members J. Lear and N. A. Wilson.

APPEARANCES: S. B. D. Wahl, R. Weiss and G. Varricchio for the applicant/complainant; Tom Dunne and David Milner for the respondent; Elizabeth Forster and Philip Prins for the intervener.

DECISION OF THE BOARD; November 8, 1991

1. This is an application for certification in which the applicant has requested a pre-hearing vote. Following the vote, the applicant the Labourers' International Union of North America,

Ontario Provincial District Council ("the Labourers") filed a complaint under section 89 of the Act alleging unfair labour practices, and seeking to rely on section 8 of the Act. The applicant also asserts section 48(a) of the Act.

2. By decision dated May 22, 1991, the Board ordered the taking of the pre-hearing representation vote in the certification application, in the following constituency:

all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction employees of the respondent in other than the industrial, commercial and institutional sector in the Province of Ontario, save and except non-working foremen, and persons above that rank.

- 3. Following the vote on May 29, all matters arising under the certification application and the related complaint of unfair labour practices were set down for hearing together before the Board. When the parties appeared before this panel on October 22, 1991 the Board heard their submissions as to the appropriate manner in which to deal with the issues raised in these two files. On that day, the Board ruled that it would determine the issues in the certification application regarding the appropriate bargaining unit, list and voting constituency prior to determining the issues in the unfair labour practice complaint, which include the issues under sections 8 and 48(a). The Board proceeded to hear argument on October 22 regarding the appropriate bargaining unit and reserved its ruling.
- 4. As the applicant is an affiliated bargaining agent, the following provisions of the Act apply to this application:
 - 144.-(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,
 - (a) an employee bargaining agency; or
 - (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

- (3) Notwithstanding subsection 119(1), a trade union represented by an employee bargaining agency may bring an application for certification in relation to a unit of employees employed in all sectors of a geographic area other than the industrial, commercial and institutional sector and the unit shall be deemed to be a unit of employees appropriate for collective bargaining.
- 5. The parties were content to base their submissions on this issue on documents submitted to the Board during the course of the application, without the need for evidence. Counsel for the intervener sought at one point to call evidence to dispute a statement made by counsel for the applicant as to certain events at the Pre-Hearing Vote Meeting. The Board declined to hear the evidence and in any event would not have found it helpful to its determination. The evidence related to the timing of the applicant's statement of intention to withdraw certain related applications for certification.
- 6. The Labourers assert that the following constitutes the appropriate bargaining unit in its application for certification:

- (a) all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector in the Province of Ontario and all construction labourers in all other sectors in the Province of Ontario, save and except non-working foremen, and persons above the rank of non-working foreman; and
- (b) all construction employees in the employ of the respondent in other than the industrial, commercial and institutional sector in the Province of Ontario, save and except construction labourers, non-working foremen, and persons above the rank of non-working foreman.
- 7. The respondent, Ben Bruinsma and Sons Limited ("Bruinsma") and intervener Construction Workers Local 53, Christian Labour Association of Canada ("Local 53") assert that the applicant's position is an expansion of the bargaining originally sought. That bargaining unit, according to the respondent and intervener, is as follows:
 - (a) all construction employees in the employ of the respondent in other than the industrial, commercial and institutional sector in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.
- 8. Bruinsma and Local 53 take the position that the above is the bargaining unit for which the applicant sought certification, and to which it ought to be restricted. They take the position that this is an appropriate unit. All parties referred in their submissions to other related certification applications filed by the Labourers, and to the Pre-hearing Vote Meeting Report signed by the parties on May 15, 1991, and we find it useful at the outset to set out this context of the parties' submissions.
- 9. On April 26, 1991, the Labourers filed 4 separate applications for certification with respect to Bruinsma. The four bargaining units sought in these applications were:
 - (a) Board File No. 0331-91-R: all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector in the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors of the construction industry in the Province of Ontario, save and except non-working foremen, and persons above that rank;
 - (b) Board File No. 0332-91-R: all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector and all construction labourers in the employ of the respondent in all other sectors of the construction industry in the Counties of Essex and Kent, save and except non-working foremen, and persons above that rank.;
 - (c) Board File No. 0333-91-R: (as amended by the applicant's letter to the Board of April 30, 1991) all construction employees of the respondent in other than the industrial, commercial and institutional sector in the Province of Ontario, save and except non-working foremen and persons above that rank.
 - (d) Board File No. 0334-91-R: all construction employees in the employ of the respondent in all sectors of the construction industry in the Counties of Essex and Kent, save and except non-working foremen, persons above that rank and persons employed in the industrial, commercial and institutional sector of the construction industry.

- 10. Notices were posted advising employees of all applications. Bruinsma filed a reply to each application. The position taken by Bruinsma in the replies was that all units sought by the applicant with the exception of that contained in Board File No. 0331-91-R, were inappropriate. Local 53 filed an intervention in each application, claiming pre-existing bargaining rights. In its interventions, Local 53 did not take a position with respect to the bargaining units sought. Both Bruinsma and Local 53 alleged that the filing of four applications was an abuse of process.
- 11. As all applications requested a pre-hearing representation vote, a meeting with a Board Officer was directed by the Registrar for May 14. This meeting was ultimately adjourned to and held on May 15, 1991. By registered mail dated May 14, 1991 and received by the Board on May 15, the Labourers requested leave of the Board to withdraw the applications in Board File Nos. 0331-91-R, 0332-91-R and 0334-91-R. The meeting of May 15, 1991, therefore, result in a Pre-Hearing Vote Meeting Report with respect to Board File No. 0333-91-R only.
- 12. At the meeting with the Board Officer on May 15, the parties failed to reach agreement on the appropriate bargaining unit. The Report sets out the units proposed by the applicant and respondent in the documents hitherto filed with the Board. Further, the positions of the parties on that date with respect to this issue are contained in Appendix "A" to the Officer's Report. This Appendix "A" is set out in full as follows:

APPENDIX "A"

Re: Appropriate B.U. Description/Voting Constit. #'s 10 & 11 of Report

1. Applicant Position

Takes the position that this is a displacement application in the construction industry and that they are seeking to displace all those employees covered by the current C.A. between the respondent and the incumbent as far as their designation allows.

2. Incumbent Position

Takes the position that the appropriate unit is that unit under sect. 144(1) of the Act and as such would be described as follows:

all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors of the construction industry in the Province of Ontario, save and except non-working foremen, and persons above the rank of non-working foreman.

The incumbent takes the position that the applicant should only be allowed to apply for the unit most closely resembling that of its unit in the current C. A. and as such the above unit is the most appropriate unit.

3. Respondent Position

Takes the same position as the incumbent.

- 13. The parties also stated their positions as to the employee list for the purposes of determining the membership position of the Labourers as of the date of application (the "count list"). Further, the parties stated their positions as to the employee list as of the terminal date for the purposes of the vote (the "vote list").
- 14. It is significant at this point to note that Local 53 sought to add 9 persons to the count

list on the basis that they would properly be included should its position on the bargaining unit be correct. It is clear that Local 53 was asserting that these 9 persons were construction labourers working in the industrial, commercial and institutional ("ICI") sector on the date of application. The Labourers took the position that these 9 persons "were performing ICI work and would therefore not be included in its proposed unit".

- 15. As stated in paragraph 2, the Board ordered the taking of a representation vote, in a voting constituency which covered the broadest group of employees encompassed by the parties' positions. All the ballots were ordered segregated and the ballot box sealed pending a further direction from the Board or agreement of the parties.
- 16. May 31, following the vote, counsel for Local 53 wrote to the Board stating:

We are writing to advise you that our client is withdrawing its challenge to the bargaining unit. For the purposes of the application, our client is prepared to acknowledge that the appropriate bargaining unit is that requested by the applicant, namely:

all construction employees of the respondent in other than the industrial, commercial and institutional sector in the Province of Ontario, save and except non-working foremen and persons above that rank.

- 17. No further correspondence was received by the Board prior to this hearing regarding the issue of the appropriate bargaining unit, although a letter from the applicant dated June 6, 1991 states its position, among other things, as to the list of eligible voters.
- 18. To complete the context of the parties' submissions, the collective agreement between Local 53 and Bruinsma, effective from January 1, 1989 until April 30, 1991, contains the following recognition clause:
 - 2.01 The Employer recognizes the Union as the exclusive bargaining agent for all its employees in all sectors of the construction industry in the province of Ontario, other than:
 - employees having a supervisory or confidential capacity, or having authority to employ, discharge or discipline employees;
 - b) office and sales staff.

Submissions of the Parties

- Counsel for the Labourers asserts that the position taken by the Labourers on October 22, 1991 is the same as that taken at the meeting of May 15, namely that the Labourers are seeking in this application to displace the bargaining rights of Local 53, to the extent that the Labourers' designation under the *Act* permits. The bargaining unit proposed by the Labourers in its submissions of October 22 (which is in fact composed of *two* units: see *infra*) accomplishes exactly this. The only group of employees for which the Labourers could not and did not seek representation rights were those trades other than construction labourers represented by Local 53 and employed in the ICI sector. In counsel's submission, its position at the hearing is the only position that makes sense in the context of the 4 applications filed by the Labourers. It was an arbitrary decision which application was ultimately pursued; it was clear to all what the intent of the Labourers was in bringing its applications.
- 20. With respect to the appropriateness of its intended bargaining unit, the Labourers referred the Board to the following cases: Crown Electric, [1982] OLRB Rep. May 660; Bruno's Contracting (Thunder Bay) Limited, [1985] OLRB Rep. Dec. 1701; Loremar Structures Inc.,

[1985] OLRB Rep. Dec. 1747; Duron Ottawa Ltd., [1983] OLRB Rep. Oct. 1639; Aero Block and Precast Ltd., [1984] OLRB Rep. Sept. 1166. Counsel outlined the development of the Board's jurisprudence with respect to the relationship between section 144 bargaining rights and displacement applications in the construction industry. Under section 144(1) of the Act, an affiliated bargaining agent may apply for a unit consisting of its traditional craft, province-wide in the ICI sector and in at least one appropriate geographic area in all other sectors. An affiliated bargaining agent may not include persons who would not ordinarily be part of its traditional craft unit in an application under section 144(1): see Bruno's Contracting (Thunder Bay) Limited, Loremar Structures Inc. However, an affiliated bargaining agent may apply to represent employees who do not fall within its craft unit, under section 144(3). Such a unit would consist of all unrepresented trades working on the date of application, in other than the ICI sector. Further, an affiliated bargaining agent may choose to make an application under both section 144(1) and (3), and the Board will treat these as two separate units: Bruno's Contracting (Thunder Bay) Limited; Loremar Structures Inc.

- Similarly, in the case of a displacement application, argued counsel, the Board has permitted an affiliated bargaining agent to carve out its traditional craft unit from the incumbent's unit under section 144(1): Crown Electric; Duron Ottawa Ltd. The Board has also stated that it is appropriate in a displacement application for an affiliated bargaining agent to make an application for two bargaining units, one under section 144(1) and the other under section 144(3). The appropriate bargaining unit in this case, therefore, is actually two units, in the submission of counsel.
- Counsel for the respondent, Bruinsma, disputed that the Labourers have been consistent in their position as to the bargaining unit sought. In his submission, the Labourers applied for four different bargaining units, they chose to proceed with one, and now wish to enlarge the unit that they chose. In his submission, the Labourers ought not to be entitled to change their position. The respondent stated its position at this juncture that the bargaining sought by the applicant in its original application under Board File 0333-91-R, as amended by its letter of April 30, is appropriate. He did not take issue with the summary of the Board's jurisprudence by counsel for the Labourers. Instead, in his view, the cases are distinguishable in that the Board on those previous occasions was not dealing with an applicant which had undergone a change of heart.
- The interveners took the same position as the respondent, with further elaboration. In essence, the submission of Local 53 was that, in their original application, the Labourers were entitled to apply under sections 144(1) and (3) of the Act, for two bargaining units. If the Labourers had sought both units, counsel stated, these would have been appropriate. Indeed, asserted counsel, this is precisely what the Labourers did. However, having withdrawn its application under section 144(1), it could not revive it at this late stage. Further, although counsel did not take issue with the cases relied on by the applicant, she submitted that in none of the cases did the Board determine that in a displacement application by an affiliated bargaining agent, an applicant was obliged to take *both* a unit under section 144(1) and under section 144(3). Rather, an applicant may choose one or the other, or both. In this case, counsel submits, the Labourers have chosen section 144(3).

Decision of the Board

24. The parties are essentially agreed as to the manner in which this Board has applied section 144 in cases involving displacement applications by an affiliated bargaining agent. The positions taken by the respondent and intervener do not dispute the appropriateness of a displacement application which seeks bargaining units under both section 144(1) and (3). The Board is satisfied that the bargaining units proposed in the Labourers submissions of October 22, 1991 are appropri-

ate. The Board is also satisfied that the unit originally stated by the Labourers in Board File No. 0333-91-R, as set out in paragraph 9(c), is also a unit appropriate for collective bargaining. Certainly, were it not for the provisions of section 144 of the *Act*, this latter proposition would not be the case. As stated in *Duron Ottawa Ltd.*, formerly, the Board's practice in displacement applications in the construction industry was the same as in non-construction cases: the applicant was required in a displacement application to take all the employees in the existing bargaining unit. However, in *Duron Ottawa Ltd.* and cases following *Duron Ottawa Ltd.*, the Board found that it would be inconsistent with the policy of section 144(1) to require an applicant to take a bargaining unit under section 144(1) which combined those employees who would be bound by a provincial agreement with employees in other trades who did not fall within the applicant's designation. Thus, an affiliated bargaining agent in a displacement application may choose to apply for its traditional craft unit only.

- Moreover, as was the case in Aero Block and Precast Ltd., to the extent that an employer had employees in other trades who could be the subject of an application under section 144(3), the applicant was entitled to apply for a separate unit under section 144(3). In our view, it may indeed be most consistent with the general policy of the Board in displacement applications to have a displacement application by an affiliated bargaining agent encompass both section 144(1) and section 144(3), where there exist employees in both units. However, we cannot conclude that an applicant must apply for both units. Since the units under section 144(1) and (3) are separate units, an applicant is entitled to choose one or the other, or both. The right to be certified exists independently for each unit.
- We thus conclude that in the current applicant, *either* the unit proposed by the Labourers in its original application in Board File No. 0333-91-R, as set out in paragraph 8(c), *or* the units proposed by the Labourers at the hearing on October 22, would be appropriate.
- We must therefore address whether the Labourers are correct in their assertion that the bargaining unit for which it seeks to be certified has remained the same throughout. If we are satisfied that the Labourers are now seeking a different unit than that for which they requested a prehearing vote, we must determine whether they are entitled to change their position at this time, to in effect enlarge the unit.
- Having reviewed the application as filed, the contents of the Officer's Report signed by all parties on May 15, and the ensuing events, we are satisfied that the Labourers did not pursue this matter on May 15 on the basis that it contained an application for certification for bargaining units under both section 144(1) and (3) of the Act. Although the statement of the applicant's position in Appendix "A" might be read as indicating an intention to apply under both section 144(1) and (3), the challenges made by the applicant to the count list are inconsistent with an application under section 144(1). The applicant clearly stated its position that certain persons should not be included on the list because they were performing work in the ICI sector.
- 29. In the context of the application as originally framed, then amended on April 30, the positions taken by all parties with respect to the lists, and the absence of a clear statement in the Report that the bargaining unit(s) sought by the applicant were those put forward by counsel for the applicant on October 22, we find that the applicant's intention on May 15 was to pursue an application for certification in regards to the unit set out in paragraph 9(c).
- 30. In addition to the facts already stated, we also note that the letter of May 31 from counsel to the intervener elicited no response from the applicant. If the applicant's position on that date was as put forward at the hearing, it is reasonable to expect that the applicant would have responded to the letter of May 31, which purports to set out the applicant's position on the bar-

gaining unit sought. We are thus in agreement with the respondent and the intervener that the applicant has enlarged the bargaining unit for which it now seeks to be certified.

- In applications for certification, the Board is generally very circumspect about permitting a party to change its position with respect to the appropriate bargaining unit once the parties have met to review the list of employees. This policy is grounded at least in part on the Board's concern that certification proceedings not deteriorate into "endless meanderings without map or compass, each turn in the journey being dictated by changing perceptions of the parties as to what best serves their own interest": See *Santa Maria Foods*, [1981] OLRB Rep. Nov. 1618 and the cases cited therein. In keeping with this general policy, on the facts of this case we do not see any reason why we should permit the applicant to enlarge the bargaining unit sought at this late stage.
- One of the applications for certification which had been specifically withdrawn by the applicant was directed to a unit of employees under section 144(1), covering, *inter alia*, construction labourers in the ICI sector. The meeting of May 15, 1991, which set the parameters for the representation vote, proceeded on the basis that the Labourers were not seeking bargaining rights in the ICI sector. Only at the outset of the hearing, almost five months after the taking of the vote, do the Labourers now assert that they wish to pursue bargaining rights for the ICI sector under section 144(1). The Board declines to allow the applicant to expand its application in this manner.
- 33. Having regard to our determinations above, the Board finds that this is an application for certification by way of a pre-hearing representation vote with respect to the following bargaining unit:

all construction employees in the employ of the respondent in other than the industrial, commercial and institutional sector in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

The Board finds the above unit to be an appropriate bargaining unit for collective bargaining. At the meeting of May 15, certain challenges were raised regarding the count list. The Board is satisfied on the evidence before it that the applicant meets the conditions of section 9(4) entitling it to a vote regardless of the outcome of these challenges; thus we see no need to inquire further into the challenges to the count list. Challenges were also raised in regards to the list of eligible voters. The Board hereby appoints a Labour Relations Officer to inquire into the list of eligible voters. We note that the parties have agreed to meet with an Officer of the Board on November 12, and we direct that they so meet for the purpose of this inquiry.

1940-91-R Ontario Liquor Boards Employees' Union, Applicant v. Fort Erie Duty Free Shoppe Inc., Respondent

Certification - Union objecting to 19 of 38 names included by employer on list of employees - Union also objecting to Labour Relations Officer's disclosure of the count in the circumstances - Board reviewing its longstanding policies and procedures and seeing nothing improper in the officer's disclosure of the count - Labour Relations Officer appointed to inquire into and to report to Board with respect to dispute regarding employee list

BEFORE: Bram Herlich, Vice-Chair, and Board Members R. W. Pirrie and D. A. Patterson.

DECISION OF THE BOARD; November 14, 1991

- 1. The name of the respondent is amended to read: "Fort Erie Duty Free Shoppe Inc."
- 2. This is an application for certification in which the parties met with a Labour Relations Officer, reached agreement on all matters in dispute between them with the exception of the matters described below and further consented to the Board issuing a decision in this matter without a formal hearing before a panel of the Board.
- 3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
- 4. Having regard to the agreement of the parties the Board finds that:

all employees of the respondent in the Town of Fort Erie regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and secretary to the Store Manager,

constitute a unit of employees of the respondent appropriate for collective bargaining.

- 5. There were 38 individuals whom the employer asserted were properly included on the list of employees for purposes of the count. The union objected to the inclusion of 19 of those individuals on the list of employees on the basis that they were not at work in accordance with the 30/30 rule, were not in an employment relationship with the respondent, or were not in the agreed bargaining unit. The applicant also objected to the Labour Relations Officer's disclosure of the count in the circumstances.
- 6. Further to that objection the Board received submissions from the parties. Correspondence from the applicant in relation to this objection provides as follows:
 - 1. Although the practice of Board officers on this issue has sadly become less than uniform in the recent past, the jurisprudence of the Board is clear. The "count" is *not* to be disclosed until after, not only the bargaining unit description is finalized, but until after the list of employees is finalized. The rationale for such a policy is obvious. Once the "count" has been disclosed to an Employer, it is an open invitation not to deal with the merits of any challenges, but merely to gerrymander the challenges in an attempt to avoid certification. The Board has long recognized this and made its policy clear:

"During the hearing the Board does not announce the count of employees or any union membership until the description of the bargaining unit is settled. Similarly it does not announce the membership count until the count of employees in the unit is determined, subject, of course, to such outstanding challenges to the list as may have

been to that point in the hearing. These rules are well known to the parties and articulated in the Board's jurisprudence. (See, Gwell Investments Ltd. [1971] OLRB Rep. Oct. 675; The Corporation of the Township of Kingston, [1975] OLRB Rep. Apr. 370; Intercity Food Services Inc. [1976] OLRB Rep. July 388; Greater Windsor Investments Ltd. Windsor Nursing Home, [1976] OLRB Rep. Sept. 515). Without these general rules certification hearings would be endless meanderings without map or compass, each turn in the journey being dictated by changing perceptions of the parties as to what best serves their own interest." (emphasis added).

See Santa Maria Foods, [1981] OLRB Rep. Nov. 1618 at para 8. See also unreported decision, dated March 21, 1989 in Graham Bros. Construction Ltd., OLRB File No. 2242-88-R, at paras. 5-6, a copy of which we enclose. Based on this jurisprudence, the ruling of the Officers is clearly wrong. The Board ought to make clear its jurisprudence to all of its officers or, in the event that the jurisprudence outlined in Santa Maria Foods is no longer the law, the Board ought to make this clear to all the parties (although the Applicant can see no basis for departing from the legitimate rationale of Santa Maria Foods).

- 7. We observe at the outset that we see nothing inappropriate in the officer having disclosed the count in these circumstances. On the contrary, we see the disclosure of the count as fully consistent with the Board's practice in this regard.
- 8. Nor do we see any inconsistency between the cases cited by the applicant and the disclosure of the count in the present case. There is no question that parties are intended to deal with issues related to the bargaining unit description and the list of employees *prior* to the announcement of the count. Nor is there any question that at least part of the rationale for that manner of proceeding is to avoid the possible gerrymandering adverted to by the applicant and certainly to avoid the "endless meanderings without map or compass" referred to in the *Santa Maria Foods* case, *supra*.
- 9. Indeed, the facts in the Santa Maria Foods case are instructive with respect to the kinds of situations the Board seeks to preclude. In that case the Board announced the count thus disclosing that the union was in a certifiable position and that the petition filed was not numerically relevant. The employer then moved to add names to the list of employees which would have made the petition numerically relevant. The union countered by asking that the Board reconsider the bargaining unit description and specifically that it exclude office and clerical staff to again make the petition numerically irrelevant. The Board declined to entertain either motion. As the other cases cited in Santa Maria Foods demonstrate, the Board is extremely reluctant to allow any party to raise new issues or take new positions with respect to bargaining unit or employee list issues once the count has been disclosed.
- However, all of this does not mean that all issues regarding bargaining unit descriptions and employee lists must be fully resolved and determined prior to any announcement of the count. That requirement would clearly subvert the process in many cases. Positions on these issues may ultimately appear marginal and fully capable of quick resolution in face of the count. To require final determination and possible litigation of these issues before proceeding to the next step in the process hardly seems productive. Indeed, the logical extension of this position might lead one to wonder when, if ever, the Board would be in a position to exercise its discretion under section 6(2) of the Act to grant interim certification, since in those cases there are, by definition, unresolved issues regarding the composition of the bargaining unit.
- 11. Thus, the practice of the Board is to require the parties to deal with and to finalize their positions with respect to bargaining unit descriptions prior to dealing with employee list issues and to deal with and finalize their positions with respect to employee list issues prior to any announce-

ment of the count. This is precisely what we understand the Board to have said in *Santa Maria Foods* when it observed that the Board:

"does not announce the membership count until the count of employees in the unit is determined, subject, of course, to such outstanding challenges to the list as may have been to that point in the hearing."

[emphasis added]

12. In formulating its policies and procedures the Board is cognizant of the practical and tactical realities involved in various kinds of proceedings before it. And while the Board's policies and procedures reflect long years of experience and labour relations expertise and have served the community well over the years, they are not carved in stone. There may well be particular or exceptional circumstances which warrant variations. Indeed, the *Graham Bros. Construction Ltd.*, case *supra*, is an example of just such a variation. Depending on the number of parties, issues, and challenges involved, the complexity of the possible permutations and combinations relating to employee support for certification of an applicant can intensify. This can be particularly true in cases involving petitions and revocations. Thus, in *Graham Bros* the Board declined to announce the count because

"[t]he Board was concerned in light of the petition and the counter petition that the resolution of the challenges could possibly indicate whether a particular person had supported or not supported the union."

Thus, in cases where the Board may be concerned about maintaining confidentiality as contemplated by section 111(1) of the *Act*, the Board or an officer conducting a meeting with the parties may decline to release the count. There was no suggestion or submission that section 111(1) concerns arose in the present case.

- 13. In summary, we see nothing improper in the officer's disclosure of the count. On the contrary, such disclosure was consistent with the Board's longstanding policies and procedures.
- Having regard to the agreement of the parties, a Labour Relations Officer, to be designated by the Board's Manager of Field Services, is hereby appointed to inquire into and report to the Board with respect to the dispute regarding the list of employees.

1811-91-OH Simon Chung, Complainant v. Goldfan Holdings Limited, Respondent

Discharge - Health and Safety - Smoking in the Workplace Act - Complainant alleging that his discharge was motivated by his activity around issue of smoking in the workplace - Board concluding that complainant was discharged solely for performance problems during his probationary period - Complaint dismissed

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members R. W. Pirrie and C. McDonald.

APPEARANCES: Simon Chung on his own behalf; John D. Millar, James Doucette, Leo Tone and Carolyn Kerr for the respondent.

DECISION OF THE BOARD; November 26, 1991

- 1. This is a complaint alleging a breach of section 24(1) of the Occupational Health and Safety Act (OHSA) and of section 8 of *The Smoking in the Workplace Act*, S.O. 1989, in the dismissal of Mr. Simon Chung. The complainant says that the real reason for his discharge was his activity around the issue of smoking in the workplace, while the respondent says that he was fired solely for performance problems during his probationary period.
- 2. The respondent ("Goldfan") is in the business of providing property management services. After being interviewed, the complainant Simon Chung was hired as a Control Centre Operator for one of the buildings managed by Goldfan. The job involves a variety of duties related to the control centre, where the controls to such systems as elevators and fire alarms are found. In addition, there are duties related to reception and phone answering. He started work on June 10, 1991, subject to a six month probation period. He was given two weeks of on the job training, after which he functioned on the job alone. He was discharged on July 17, 1991.
- 3. The respondent's evidence was to the effect that Mr. Chung was not performing adequately in certain aspects of the job, that its managers realized early on that his hiring had been a mistake, and simply corrected that mistake by releasing him during his probationary period. Carolyn Kerr, the Assistant Building Manager, and Chung's supervisor, had received complaints from various sources, including the Vice President, Leasing and Marketing, James Doucette. She also found him abrupt and somewhat arrogant in his relations with the public and co-workers. Kerr testified that she had observed an incident from which she concluded that Chung had difficulty communicating with the public, and was not quick enough to perceive when someone was not satisfied with his responses. She also noted that he had been spoken to twice about reading while on duty, and asserted that he had been using the company's computer for the composition of personal short stories.
- 4. Further, she said she had spoken to Chung three times before he went to get his uniforms fitted and that he had been spoken to about being late for lunch. She acknowledges there were no complaints from tenants and that he did the portions of his job relating to the control panels satisfactorily. She was spoken to by Doucette who indicated to her he was not happy with Chung's performance at the front desk.
- 5. Doucette's evidence detailed his dissatisfaction with the complainant's message taking skills, and general demeanour when dealing with the public. In dealing with his portfolio of leasing and marketing, he was particularly concerned about the fact that there was a high vacancy rate in downtown Toronto generally, and in the relevant building in particular. This meant that an attitude of helpfulness and service to the public was particularly important in reception and phone answering, and he felt that Chung fell short in this area. He cited examples of not being able to understand what Chung was saying on the phone, reticence in giving details of messages and omission of pertinent facts from messages, such as requests not to be phoned until after a certain hour.
- 6. Kerr spoke to Chung formally about the concerns on the morning of July 17. When she had listed the points of dissatisfaction, Chung asked her if that was all. She took this as a dismissive, inappropriate response. When she reported it to Bradley, he told her to fire him, which she did later that afternoon.
- 7. Kerr denies that smoking had anything to do with the discharge. She emphasized that she discharged Chung after being told to do so by her superior, Property Manager Bradley, a non-smoker. She agrees that Chung had asked her not to smoke when they were working together, but denies that this was a problem to her, or part of the company's decision making. She asked Chung

if he wanted the control centre designated a non-smoking area as well, the rest of the common areas of the building having already been so designated. He replied that it would be sufficient if she did not smoke in his presence. She maintains that she complied with that request without difficulty because she was able to smoke in the washroom area adjacent to the control centre, where there is a telephone which she uses in her work. Other employees were also made aware they were not to smoke in the control room when Chung was there.

- 8. Not surprisingly, Chung's version of the conversation about smoking is somewhat different. He says she was visibly upset and sarcastic in her tone of conversation. He asserts and she denies, that he said, "I hope you don't mind", and that she retorted, "I do mind, but there's not much I can do". He also says he explained the Toronto By-Law on smoking to her and agreed to content himself with the arrangement worked out only as a compromise because she seemed upset. Further, he says she continued to smoke in the control centre, at least to the extent of lighting up or finishing up cigarettes there. She acknowledges smoking in the unisex washroom area 15 to 20 feet from the control room, but did not think this area fell within the agreement not to smoke in the control room when Chung was present.
- 9. Chung says that no problems with his work were mentioned until after he raised the issue of smoking, and that the performance problems raised are either trivial or vague and unspecific, effectively a masquerade for the real reasons for his discharge his pursuit of a smoke-free environment at work. He says that all the complaints are ones of interpretation and judgement, filtered through and coloured by Kerr's negative response to his request that she not smoke in his presence. He maintains there was no serious discussion of problems until the day of his discharge, July 17 and he could have remedied all the problems she mentioned had he been given a chance. As for his response to her complaints he said he was trying to display polite attention and he was asking if that was all in a neutral manner. He says that the allegation that he was writing a short-story was never mentioned to him during his employ, and that in fact he was working on learning a computer system available in the terminal. Kerr acknowledged he had been authorized to work on the Lotus 1, 2, 3 Computer package but she did not accept that was the activity in which he was engaged at the time.
- 10. The governing section in his dispute is section 24 of the *Occupational Health and Safety Act*, (the OHSA) which provides in relevant part as follows:
 - 24.-(1) No employer or person acting on behalf of an employer shall,
 - (a) dismiss or threaten to dismiss a worker;
 - (b) discipline or suspend or threaten to discipline or suspend a worker;
 - (c) impose any penalty upon a worker; or
 - (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply with all necessary modifications to the complaint.

- (3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 89 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act.
- (4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), sections 102, 103, 106, 108 and 109 of the *Labour Relations Act* apply with all necessary modifications.
- (5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

. . .

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

. . .

- 11. Also pleaded in this matter is section 8 of *The Smoking in the Workplace Act*, S.O. 1989, which reads as follows:
 - 8.-(1) No employer or person acting on behalf of an employer,
 - (a) shall dismiss or threaten to dismiss an employee;
 - (b) shall discipline or suspend an employee or threaten to do so;
 - (c) shall impose a penalty upon an employee; or
 - (d) shall intimidate or coerce an employee,

because the employee has acted in accordance with or has sought the enforcement of this Act.

(2) Subsections 24(2) to (8) of the Occupational Health and Safety Act apply with necessary modifications when an employee complains that subsection (1) has been contravened.

This legislation came into effect January 1, 1990 and prohibits smoking in enclosed workplaces, except in employer designated smoking areas. In the building in question, the control centre and washroom area had been considered smoking areas at the time of Chung's hiring, while the lobby, corridors and other common areas were non-smoking areas.

- 12. Chung's complaint suggests that he was seeking enforcement of the City of Toronto's By-Law 23-88 respecting smoking in the workplace as well. Potentially relevant sections of that By-Law are as follows:
 - 2. (1) Every employer in the City of Toronto shall, before March 1, 1988, adopt and implement a smoking policy in respect of each workplace under the control, supervision or ownership of the employer;
 - (2) Where after March 1, 1988, a workplace is created or comes into existence, the employer of such workplace shall within 7 days after such workplace is created or comes into existence, adopt and implement a smoking policy in respect of each such workplace under the control, supervision or ownership of the employer.

- 3. Every employer required by the By-Law to adopt and implement a smoking policy shall
 - (a) thereafter maintain that smoking policy in the workplace for which it was adopted;
 - (b) give notice of the adoption of the smoking policy to each employee in the workplace within 7 days after the day upon which the smoking policy in respect to that workplace was adopted;
 - (c) erect signs in accordance with section 10 of this By-law indicating where smoking is prohibited by the smoking policy; and
 - (d) erect signs in accordance with section 10 of this By-law at every entrance to the workplace indicating that smoking is prohibited in certain areas thereof by the smoking policy.
- 4. If a smoking policy has been adopted as required by section 2 of this By-law a non-smoking employee may object to the employer about smoke in the workplace and where a non-smoking employee so objects, the employer shall attempt to reach a reasonable accommodation between the preferences of non-smoking and smoking employees using already available means of ventilation, separations or partitions, but no employer shall be required to make any expenditures or structural alterations to the workplace to accommodate the preferences of non-smoking employees.
- 5. If an accommodation referred to in section 4 satisfactory to all non-smoking employees in the workplace cannot be reached, the employer shall prohibit smoking in that workplace and shall erect signs in accordance with section 10 of this By-law throughout the workplace and at every entrance to the workplace indicating the prohibition.
- 6. No person shall smoke in a workplace contrary to the smoking policy adopted for that workplace.
- 7. No person shall smoke in a workplace where an employer has prohibited smoking in that workplace as required by section 5 of this By-law.
- 8. No employer shall permit smoking in a workplace contrary to the smoking policy adopted for that workplace.
- 9. No employer shall permit smoking in a workplace where the employer is required under section 5 of this By-law to prohibit smoking.

Additionally, it is pleaded he was seeking enforcement of section 14(2)(g) of the OHSA, which provides as follows:

14.-(2) Without limiting the strict duty imposed by subsection (1), an employer shall

(g) take every precaution reasonable in the circumstances for the protection of a worker;

- The employer did not argue that Chung's actions in requesting Ms. Kerr not to smoke were not within the ambit of the relevant legislation. Thus, we have assumed, without deciding, that Chung was either acting in compliance with, or seeking the enforcement of one or both of OHSA or *The Smoking in the Workplace Act*. Nor is it necessary to decide whether an attempt to enforce the By-law is equivalent to an attempt to enforce one of the other pieces of legislation, a point on which neither party made argument.
- 14. We have considered all the evidence and submissions in light of the onus of proof and are of the view that the complaint must be dismissed. Even accepting Chung's account of Kerr's

reaction to his request not to smoke in his presence, we are persuaded that the reasons given for Chung's release from probationary employment were the real ones and they were not tainted by anti-safety animus or in response to Chung's activities around smoking. The discharge was prompted principally by the complaints from Doucette, who came and explained why he was dissatisfied in a credible way. There was no suggestion or evidence that he even knew about the exchange between Chung and Kerr about smoking or that his judgement was somehow affected by hers. It is clear that in the hierarchy of this company, his opinion had great weight with Kerr.

- As to Kerr's grounds for dissatisfaction, Chung agrees that many of the incidents took place, such as reading on duty and slowness to get his uniform. He did not dispute he was late returning from lunch. He feels that the reading on duty issue and the uniform problem were results of misunderstandings which Kerr cleared up on July 17. He denies he was writing a personal short story on company time and it is clear that this was not one of the grounds of dissatisfaction discussed with him on July 17. Although it is true that many of these things did not surface until after the smoking exchange, it must be kept in mind that the exchange took place on the second day Chung and Kerr were working directly together; her main opportunity to observe him had just started. Even though they had not been working as closely together previously, as Chung was being trained by someone else, Kerr had spoken to him twice about reading on duty before the smoking conversation. (Since the employer is not relying on it, it is unnecessary to deal with the occasion when Chung smoked what he says was a herbal cigarette at work.)
- 16. If Chung had been a long-service employee, his argument that these reasons were not serious enough to be credible reasons for his release would have more force. Given the fact that he was still on probation, the reasons given by the employer were plausible. Their witnesses were credible, even if their memories on some details was not as sharp as Chung's, since he had been keeping notes of his conversations. The discharge did not come on the heels of the smoking exchange with Ms. Kerr, and was not initiated by her, although the concerns raised by Doucette were consistent with her own observations.
- 17. In the alternative the complainant asked us to apply section 24(7) and reduce the penalty to a suspension. In the circumstances of this case, we see no reason to interfere with the penalty imposed. The release of a probationary employee of five and one-half weeks experience where there is no contractual constraint is not something that in our view warrants the exercise of the section 24(7) discretion, and we were referred to no authority or reasoning to suggest otherwise.
- 18. For the reasons given above, the complaint is dismissed.

0909-91-R; 0911-91-R; 0918-91-R; 0985-91-U; 1078-91-R; 1175-91-R; 1081-91-U; 1281-91-U United Brotherhood of Carpenters and Joiners of America, Local 2486, Applicant v. Guillot Builders Limited, Respondent v. Labourers' International Union of North America, Ontario Provincial District Council; International Brotherhood of Painters and Allied Trades; Retail, Wholesale and Department Store Union, Interveners v. Group of Employees, Objectors; International Brotherhood of Painters and Allied Trades, Applicant v. Guillot Builders Limited, Respondent v. United Brotherhood of Carpenters and Joiners of America, Local 2486, Labourers' International Union of North America, Ontario Provincial District Council, Retail, Wholesale and Department Store Union, Interveners v. Group of Employees, Objectors; Labourers' International Union of North America. Ontario Provincial District Council, Applicant v. Guillot Builders Limited, Respondent v. United Brotherhood of Carpenters and Joiners of America, Local 2486, International Brotherhood of Painters and Allied Trades, Labourers International Union of North America (Ontario Provincial District Council), Retail, Wholesale and Department Store Union, Interveners v. Group of Employees, Objectors; International Brotherhood of Painters and Allied Trades, Complainant v. Guillot Builders Limited, Respondent v. United Brotherhood of Carpenters and Joiners of America, Local 2486, Retail, Wholesale and Department Store Union, Interveners v. Group of Employees, Objectors; Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant v. Guillot Builders Limited, Respondent v. United Brotherhood of Carpenters and Joiners of America. Local 2486, International Brotherhood of Painters and Allied Trades, Labourers' International Union of North America, Ontario Provincial District Council. Interveners; Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant v. Guillot Builders Limited, Respondent v. United Brotherhood of Carpenters and Joiners of America, Local 2486, International Brotherhood of Painters and Allied Trades, Labourers' International Union of North America, Ontario Provincial District Council, Interveners; United Brotherhood of Carpenters and Joiners of America, Local 2486, Complainant v. Guillot Builders Limited, Respondent v. Retail, Wholesale and Department Store Union, International Brotherhood of Painters and Allied Trades, Intervener; Labourers' International Union of North America, Ontario Provincial District Council, Complainant v. Guillot Builders Limited, Respondent v. Retail, Wholesale and Department Store Union, United Brotherhood of Carpenters and Joiners of America, Local 2486, Interveners

Bargaining Unit - Certification - Construction Industry - Carpenters, Labourers and Painters unions each filing separate certification applications - RWDSU filing two certification applications covering Sudbury and Sault Ste. Marie employees encompassed by the earlier filed applications - RWDSU seeking "all employee" bargaining unit - Board satisfied that standard craft units appropriate - Board then declining to allow RWDSU to amend its applications to seek to represent employees in the craft bargaining units - On request of RWDSU, Board deferring consideration of the RWDSU applications until applications filed by construction trades finally resolved

BEFORE: Robert Herman, Vice-Chair, and Board Members D. A. MacDonald and C. A. Ballentine.

APPEARANCES: John Moszynski, Arthur Adams for Labourers' Ontario Provincial District Council; Roland Simoneau for the objectors; Eric del Junco, Robin McArthur, for Retail, Wholesale and Department Store Union; James Nyman, Fred Karst for United Brotherhood of Carpenters and Joiners of America, Local 2486; and Frank McCool for International Brotherhood of Painters and Allied Trades; David C. Daniels, Guy Guillot for the respondent, Guillot Builders Limited

DECISION OF THE BOARD; November 4, 1991

- 1. On June 17, 1991, Carpenters, Local 2486, (the "Carpenters") the Labourers International Union of North America, Ontario Provincial District Council, ("the "Labourers") and the International Brotherhood of Painters and Allied Trades, (the "Painters") each filed a separate application for certification with respect to the respondent Guillot Builders Limited. The name of the respondent is amended to read "Guillot Builders Limited". On June 26, 1991, prior to the terminal date of the three previously filed applications, the Retail, Wholesale and Department Store Union ("RWDSU") filed its own application for certification, covering Sudbury employees encompassed by the earlier filed applications. RWDSU later filed another application for certification, on July 4, 1991, but this second RWDSU application was filed after the terminal dates of the applications filed by the craft unions. This second application concerned Sault Ste. Marie employees, some of whom might be covered by the 3 applications filed by the craft unions.
- 2. A petition was filed by employee objectors with respect to the three original applications filed by the Labourers, Carpenters, and Painters.
- 3. On July 25, 1991, the parties all met with a Board Officer, in an attempt to narrow the issues and to state their positions. As a result of that meeting, numerous challenges were raised by various parties, and the parties agreed to adjourn the hearing date set for August 1, 1991, to be scheduled in further consultation with the parties. Ultimately, the Board convened a hearing on October 29, 1991 to deal with various procedural matters. We set out below some of our oral rulings and reasons for them.
- We turn first to the appropriate bargaining unit description(s). Each of the three trades, the Labourers, the Carpenters, and the Painters, seek their traditional construction trade bargaining unit descriptions. Each of those descriptions has been agreed to by the respondent employer, and reflected in the Board Officer's Report. RWDSU seeks essentially a single "all employees" bargaining unit, encompassing employees working in both Sudbury and Sault Ste. Marie. After hearing the submissions of the parties, the Board orally ruled that the appropriate bargaining units were the standard craft or trade bargaining unit descriptions, as reflected in the Board Officer's Report, with respect to the three certification applications filed by the construction trades. For purposes of its ruling, the Board accepted as fact those matters stipulated by RWDSU. Specifically, the Board accepted that there was an extreme degree of intermingling of the trades amongst the employees at work at the relevant time. RWDSU also asserted that almost all the employees worked no more than fifty per cent of the time within their own trade, and each did the work of the others' trade on a regular basis. It was also asserted that this exchange of work had allowed the company to some extent to avoid layoffs in the past.
- 5. Notwithstanding those facts, the Board was satisfied that the standard craft bargaining units were appropriate in these proceedings. The Board noted that the employer and the three craft construction trades had agreed that the standard craft bargaining unit descriptions were

appropriate. The applications for certification for the three trades had been filed earlier than the two applications filed by RWDSU. There was no dispute that the respondent employer was an employer in the construction industry. The statutory provisions covering bargaining units and certification in the construction industry set up a designation or craft system with respect to certification, while still allowing non-craft unions to apply to represent groups of employees. Nevertheless, the overall scheme is directed towards a fragmented craft system of representation. In all these circumstances, the Board found appropriate the trade bargaining unit description reflected in each of the respective applications filed by the Carpenters, Labourers, and Painters. Generically described, those bargaining unit descriptions refer to the particular trades in the industrial, commercial, and institutional sector of the construction industry and all other sectors in Board Area #17.

- 6. After delivering this ruling, RWDSU sought to amend the bargaining unit description it was requesting, to seek to represent employees in the craft units the Board had found appropriate. The Board ruled that it would not grant the amendment sought. RWDSU had filed an application pursuant to the industrial, non-construction, provisions under the Act. It had not sought in those applications the bargaining units it was now seeking. The postings in the work place had been with respect to the bargaining unit descriptions sought in its applications, and not the units it now sought. RWDSU was not a construction trade union. It was seeking to amend its bargaining units after appearing at the meeting with the Board Officer, after taking a different position there as to the appropriate units and after the Board had ruled on the appropriate bargaining units. In all these circumstances, the Board would not allow RWDSU to amend its applications to seek to represent employees in the craft bargaining units.
- RWDSU then asked that its two applications be deferred, pursuant to section 103(3)(b) of the Labour Relations Act, until the three applications earlier filed by the construction trades had been finally resolved. It also sought leave to amend the bargaining unit descriptions to reflect the descriptions sought in its original applications, rather than those agreed to at the meeting of the Board Officer. After hearing the submissions of the parties, the Board ruled that it would defer consideration of the two RWDSU applications (Board File Nos. 1078-91-R, and 1175-91-R). It further ruled on a matter upon which it had earlier reserved, ruling that the application dates and terminal dates for the two RWDSU applications would remain as they were; that is, the RWDSU applications would have their own separate application dates and terminal dates. This ruling was without prejudice to the rights of the parties in those applications, if they should proceed, to address whether the application dates ought to be amended. The Board also ruled that RWDSU could ask for the bargaining unit descriptions it originally sought. Of course, those applications remain deferred until the applications of the Labourers, Carpenters, and Painters are all finally resolved. We return now to those 3 applications.
- 8. With respect to the petition, it was agreed that there was no objection to the timeliness of the petition.
- 9. At that point in the hearing, the employee representing the employee objectors, Mr. Simoneau, asked that the matter be adjourned in order to enable him to retain legal counsel to represent the employee objectors. The three applicants objected to an adjournment at that stage of the proceedings.
- 10. The Board denied the adjournment request. Mr. Simoneau had had considerable advance notice of the hearing date, and the purpose of the hearing. The hearing was only to deal with preliminary, or procedural, matters and not the merits of the proceeding. Only a few such matters still remained to be considered; specifically, deciding what issues the panel would hear,

whether to appoint a Board Officer, the order in which the parties would lead evidence, and future hearing dates. Mr. Simoneau had already attended, along with the other parties, the meeting with the Board Officer at which various matters were resolved and various positions of the parties taken. To adjourn would delay the proceedings, to the prejudice of the applicants. Further, there had been no prior notice of the request for the adjournment. The Board advised Mr. Simoneau that he was of course entitled to retain counsel to represent him and the employee objectors, but that the hearing would not at that point be adjourned.

- In any event, these matters were adjourned shortly thereafter, to continue, in Sudbury, on January 23, 24, March 17, 18, 24, 25, 26, and June 9, 10, 11, 16, 17, and 18, 1992. All of those dates were acceptable to all those present, although Mr. Simoneau did note that he had no idea whether any counsel he retained might be available on those days. The hearing of November 13, 1991 was cancelled.
- 12. The purpose of the hearing on those dates will be for the panel to hear the evidence and submissions of the parties with respect to the issues concerning the three section 89 complaints filed, the section 8 allegations, the voluntariness of the petition, and the challenges to the 3 lists of employees that allege that the individual challenged exercises managerial authority within the meaning of section 1(3)(b) of the Act.
- 13. With respect to the remaining challenges (other than the section 1(3)(b) challenges) raised before the Officer, and reflected in the Board Officer's Reports, a Board Officer is hereby appointed to enquire into and report back to the Board with respect to those challenges. The Board Officer's examinations are not to await the panel's hearings into these matters, but to proceed forthwith. However, the Officer is directed not to schedule his or her examinations on the dates set for the hearing of this matter, as noted above. The location of the examinations will be up to the Board Officer, but the parties request that the Officer canvass with them first their preferences in this regard.
- In summary, the Board panel will hear everything other than those challenges raised before the Board Officer, which involve whether the particular person was performing work in the applicable bargaining unit at the relevant time. The parties are to be prepared to litigate before the Board panel every other matter that is arguably relevant to the section 8 and section 89 issues, petition voluntariness, and section 1(3)(b) challenges. With respect to the challenges that individuals exercise managerial functions, those asserting that the particular individual is managerial ought to be prepared to call that individual as their witness. However, the Board will ensure that each party, including the party calling that witness, is afforded full opportunity of cross-examination with respect to that witness, although the party calling that witness will only have cross-examination rights with respect to evidence touching upon the issue of whether the individual exercises managerial functions. With respect to evidence that does not touch upon that matter, the party calling that witness will not have the right to cross-examine him.
- The Board ruled that in terms of the order of calling evidence, the employer would proceed first, followed by the employee objectors or petitioners, and then the Carpenters, Labourers, and Painters, in turn. The Board also ruled that the parties would then have a follow-up opportunity, consistent with the limitations applying to the follow-up opportunity. This order of proceeding would apply both to the order in which parties will call their evidence, and, with the necessary changes, to the order of cross-examination and re-direct.
- 16. These proceedings were adjourned on the above described basis.

0937-90-R Hotel Employees Restaurant Employees Union, Local 75, Applicant v. Holiday Inns of Canada Ltd., Respondent

Bargaining Unit - Certification - Employee - Security Guard - Whether certain individuals exercising managerial functions - Whether one of these employees also performing security services and, therefore, excluded by virtue of section 12 of the Act - Sous-chefs, although supervising immediate work of individuals with whom they work, not exercising managerial functions - Banquet captain, fitness centre manager, chief steward, assistant housekeeper, host/hostesses not performing managerial functions - Temporary assignment of banquet captain to security department not falling within ambit of section 12 of the *Act* - Board determining that food and beverage receiver and housekeeping clerk sharing greater community of interest with employees in proposed unit than with office and sales exclusion

BEFORE: M. A. Nairn, Vice-Chair, and Board Members J. A. Rundle and D. A. Patterson.

APPEARANCES: Alick Ryder for the applicant; Stephen Shamie, Stephen Gleave, Mary Cox and Carol Fenn for the respondent.

DECISION OF THE BOARD; November 22, 1991

- 1. Having regard to the information provided by the respondent at the outset of this hearing and there being no objection taken by the applicant the style of cause is hereby amended to reflect the correct name of the respondent: "Holiday Inns of Canada Ltd.".
- 2. This is an application for certification. Pursuant to an earlier decision of the Board a Labour Relations Officer was appointed to inquire into and report to the Board with respect to a number of challenges made by the applicant to the composition of the bargaining unit and to the list of employees in the bargaining unit. A Labour Relations Officer convened meetings with the parties and heard evidence with respect to these matters. Transcripts were prepared and provided to the parties following which written submissions were filed with the Board by both parties. At their request a hearing was convened before this panel to hear the further submissions of the parties with respect to the conclusions the panel should reach in light of the evidence.
- 3. The report of the Officer identifies that there were nine remaining challenges to the list of employees made by the applicant on the basis that the individuals employed exercised managerial functions and therefore ought to be excluded from the bargaining unit pursuant to section 1(3)(b) of the *Labour Relations Act* (the "Act"). The applicant also asserted that one of these employees was performing security services and therefore ought also to be excluded by virtue of section 12 of the Act. In addition there were two challenges made by the applicant to exclude employees from the bargaining unit on the basis of their community of interest ("control clerk" and "administrative assistant"). It was the position of the applicant that their community of interest was more closely associated with the office group of employees. It was the position of the respondent that all eleven persons were properly included in the bargaining unit.
- 4. In their written submissions to the panel and before us the parties confirmed that they were in agreement with respect to five other challenges. The parties are agreed that D. Crone, D. MacLean, A. Sarr, and A. Doherty are properly included in the bargaining unit. The parties are further agreed that J. Koleros is properly excluded from the bargaining unit in that he exercises managerial functions in accordance with section 1(3)(b) of the Act.
- 5. Following an initial meeting with a Labour Relations Officer upon filing the application

for certification the parties entered into minutes of settlement which were entered as exhibit 33 in these proceedings. There is a dispute between the parties as to the binding effect of that settlement. However the parties chose not to place that issue before this panel. A section 89 complaint remains outstanding. However, at the outset of this hearing the applicant did seek to have the panel deal with an additional challenge to the list. It was the applicant's position that relying on the evidence in the transcripts the panel ought to hear submissions with respect to the question of whether or not M. Yordanou was a security officer at the relevant time and therefore ought to be excluded from the bargaining unit pursuant to section 12 of the Act. The respondent opposed this request. Having heard the representations of the parties we ruled that even assuming that a challenge to Yordanou could be raised at this stage we were not prepared to hear it on the basis of the evidence on the record given that at the time that evidence was called the respondent was not aware that Yordanou was being challenged and therefore had no opportunity to assess whether it wished to call any evidence on that issue. The subsequent question of whether or not additional evidence could be called by one or both of the parties raised the issue of the binding nature of the settlement between the parties filed as exhibit 33; an issue that the parties were not seeking to put before the panel at this time. Therefore we declined to deal with any issue in respect of a challenge to Mr. Yordanou at this time and indicated that we would deal with the remaining 11 challenges outlined in the Officer's report.

- 6. The parties were agreed that the evidence concerning N. Kaulback and P. Talon was representative of the duties and responsibilities of D. Everitt. Although referred to in the written submissions of the applicant, neither party sought to raise any issue with respect to the indication in the transcripts of the officer's report that a section of tape was not transcribed. Neither party sought to rely on that evidence.
- As indicated, the evidence with respect to these challenges has been transcribed and been made available to the parties and the panel. We have reviewed those transcripts carefully and do not intend to refer to or summarize the evidence contained in them except as is necessary to explain our decision. We will deal with the challenges in the order that the parties dealt with them at the hearing. At the outset we note that in a number of cases the respondent's indication on its list of employees as filed stipulate a title or classification for employees that is different from that identified during the course of the examinations. In this regard the applicant argued that the panel ought to be more circumspect concerning the evidence provided by the respondent and that these matters amounted to a fraud on the Board. The representative of a respondent who prepares the list of employees is expected to confirm its accuracy by their signature. The result of inaccuracy is inevitably delay in dealing with the application. Challenges to the list may have to be made unnecessarily and result in the waste of considerable time and expense for the parties and for the Board. We note however that on the issue of whether certain challenged individuals herein exercise managerial authority that, regardless of their title, we have the benefit of the evidence with respect to their actual duties and responsibilities. It is on that basis that we draw our conclusions with respect to their inclusion or exclusion from the bargaining unit.
- 8. Although the applicant submitted that the standards of the hotel industry were to be a guide post by which the Board should determine the managerial nature of these employees' duties, there was neither any evidence nor caselaw to support the proposition that the Board should depart from the usual indicia with respect to whether persons were exercising managerial functions. To the contrary, in *Waldorf Astoria Hotel*, [1981] OLRB Rep. Sept. 1308, in a case dealing with the managerial status of a head housekeeper in a hotel operation the Board stated:

^{5.} The criteria which are generally considered by the Board to be relevant to the determination of whether or not an individual exercises managerial functions are well established in the

Board's jurisprudence; see, for example, Hydro Electric Commission of Borough of Etobicoke, [1981] OLRB Rep. Jan. 38 and the cases cited therein.

- 9. And in Windsor Arms Hotel Limited, [1981] OLRB Rep. Sept. 1313, the Board stated:
 - 5. The managerial status issue does not raise any novel question of law, nor are the facts especially complicated. The task facing the Board is simply to weight the factors which point in one direction against those which point in the other, and assess the evidence in light of the statutory purpose which section 1(3)(b) was designed to accomplish. We do not think any useful purpose would be served by reviewing, once again, the Board's jurisprudence concerning section 1(3)(b). (See for example *The Cottage Hospital*, [1980] OLRB Rep. March 304, *Caledon Hydro*, [1979] OLRB Rep. Oct. 924, and the many cases digested in Sack & Levinson *Ontario Labour Relations Board Practice*). It is sufficient to note that in the case of so-called "first line" managerial employees, the important question is the extent to which they make decisions which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is incompatible with participation in trade union activities as an ordinary member of the bargaining unit.

We have adopted the approach in those cases in assessing the evidence before us.

- 10. By way of background the respondent operates a hotel near the Pearson International Airport. The bargaining unit in question is one that includes all employees engaged essentially in performing service functions for the hotel. Office, sales and accounting staff are excluded, as are reservation agents, guest service representatives, and security staff. It is a full-time employee bargaining unit only.
- The applicant argued that the conditions of employment of various of the challenged employees were sufficiently different from employees in the bargaining unit so as to draw distinctions between them. We note generally that in many cases where the applicant submitted that employees were paid on a salary basis the evidence indicates that hourly wages are also noted for the employees. In addition we are not satisfied that the treatment of payment for overtime contrasted with the availability of time off in lieu of overtime worked is sufficiently clear or consistent within the hotel to draw any conclusions with respect to employees' managerial authority. Finally to the extent that the applicant sought to rely on the challenged individuals' training of other employees, it is apparent that training is conducted by a "sponsor trainer" which is a program available at the hotel in which bargaining unit members participate and become sponsor trainers (see the evidence relating to Agaton, Singh, and Kaulback). Consequently we placed little if any weight on this as indicia of managerial authority.
- 12. R. Charles and K. Leung are employed as Sous-Chefs at the hotel. They report through the Executive Sous-Chef to the Executive Chef. Both those positions are excluded from the bargaining unit on the basis of their managerial authority. Summarizing the evidence with respect to both these individuals it is clear that they work primarily preparing food for the kitchen. They have first and second cooks under their supervision and work assignments are distributed to the cooks by the Sous-Chef. These assignments arise from menus that are prepared by the Executive Chef in accordance with predetermined contracts. While the Sous-Chefs may have some authority to grant time off or to authorize overtime they play no role in the hiring process. They have no authority to lay off or terminate employees. Although they could be expected to report problems in the kitchen to the Executive Chef they play no role in the disciplinary process. We are satisfied that neither R. Charles nor K. Leung, although they supervise the immediate work of the individuals with whom they work are not exercising managerial functions in accordance with section 1(3)(b) of the Act.
- 13. The applicant sought to exclude S. Rajaratnam on three grounds; that Mr. Rajaratnam

was manager of the security department on the date of application and therefore both because of his managerial authority and as a security guard was precluded from being within the bargaining unit. Thirdly, in the alternative if Mr. Rajaratnam was a Banquet Captain he ought to be excluded because of his exercise of managerial functions. With respect to the first two assertions the applicant relies primarily on exhibit 7. That document makes it clear that Mr. Rajaratnam was responsible for the security department on a temporary basis. Mr. Rajaratnam was working as a Banquet Captain in the hotel and in order to avoid a lay-off he was offered the opportunity to train in the security department on a temporary basis. At the same time the hotel was actively recruiting to replace its Manager of Security Services who had left. Mr. Rajaratnam accepted the assignment for a period of some three weeks following which he returned to his position as Banquet Captain. We do not accept that by virtue of this temporary reassignment Mr. Rajaratnam either became a managerial employee in the security department or became a security guard within the meaning of section 12 of the Act. The evidence does not establish that he performed any managerial functions during this period nor does it establish that he performed the functions of a security guard so as to fall within the ambit of section 12 of the Act (see Maplegrove Building Specialties Limited, [1984] OLRB Rep. Apr. 635). His classification remained that of Banquet Captain although on temporary reassignment. That reassignment was clearly designed to avoid his lay-off from employment. He did also continue to perform at least some if not all of his functions as Banquet Captain during this time.

- As Banquet Captain Mr. Rajaratnam works with porters in setting up rooms for both meetings and banquets. He assists with portering during the service of banquets. He has no role in hiring or firing, nor participates in any decisions in respect of lay-offs or transfers of employees. He does not perform performance appraisals of employees. He does not perform a supervisory role except to organise the work of porters from a predetermined schedule. We note that the applicant has agreed that those employees in the position of Room Service Captain fall within the bargaining unit. This is consistent with our conclusion that Mr. Rajaratnam as Banquet Captain does not perform managerial functions so as to be excluded from the bargaining unit on the basis of section 1(3)(b) of the Act.
- S. Connelly worked in the fitness centre. There is a dispute concerning his actual title during the time leading up to and including the day of application for certification. In February 1990 Mr. Connelly was made Acting Manager of the Fitness Centre having been employed as a fitness attendant. At that time he received a wage increase which included a commission component. Mr. Connelly operated the fitness centre during the day and was replaced on evenings and weekends by part-time relief staff. He reported to the Assistant Manager of Rooms. In addition to the daily running of the Fitness Centre which included the upkeep of the facility, the cleaning of the facility, making deposits from membership or retail sales, Mr. Connelly also scheduled the parttime relief staff. Those schedules were generally prepared on a month-to-month basis although Mr. Connelly did have authority to alter the schedule to accommodate the part-time staff's other commitments, for example school. While Mr. Connelly signed the part-time staff's time sheets he did not have authority to grant overtime. Although Mr. Connelly would be responsible for maintaining supplies in the fitness area those were actually ordered through the maintenance department. While in this position Mr. Connelly did not hire or fire any staff or participate in any discipline or transferring or laying off of any employee. To the extent that Mr. Connelly evaluated any employee it was simply reporting to his supervisor, Mr. Vallevand, the nature of any concerns arising in the daily operation of the area. He filed no formal reports and had not been advised that he had any authority with respect to discipline or the hiring or firing of employees. While Mr. Connelly felt he had the authority to recommend wage increases that had never occurred. He did not attend meetings of management. He did attend meetings of the Employee Representative Committee as a representative of the employees in the fitness area. Essentially Mr. Connelly was the

only full-time employee in the area and as such had certain additional responsibilities over the part-time relief staff. Any decisions affecting the employees or decisions other than a minor nature affecting the operation of the fitness area would be directed to Mr. Vallevand. While it is apparent that Mr. Connelly felt he was a part of the management structure in the hotel we do not accept that the employer held him out as such except in an acting capacity. More importantly, on the evidence we are not satisfied that Mr. Connelly actually performed functions that would bring him within the ambit of section 1(3)(b) so as to exclude him from the bargaining unit.

- 16. R. Singh is employed as chief steward. In that capacity he assigns the work of ten or eleven dishwashers and cleaners. Eighty-five percent of his time is spent performing the same work as these individuals although in addition he schedules the employees. However that scheduling requires the approval of his supervisor. To the extent that there might be some discrepancies in the evidence between Mr. Singh and Mr. Lund we prefer the evidence of Mr. Lund. The evidence of Mr. Singh is contradictory and in some cases improbable. We are satisfied that his role in the hiring process was limited to acting as an interpreter to assist the respondent. While he has some supervisory authority over the employees involved in cleaning, the vast majority of his time is spent performing bargaining unit work and his supervisory duties are not such that would bring him within the exercise of managerial functions pursuant to section 1(3)(b) of the Act.
- C. Agaton was on the list of employees as a room-checker but was employed in the position of assistant Housekeeper. In that capacity she may assign rooms to room attendants for cleaning and supervise the work performed by room attendants or housemen. She reports to the Assistant Executive Housekeeper or the Executive Housekeeper, both of whom are excluded from the bargaining unit. Ms. Agaton plays no role in hiring employees. She may identify potential discipline problems to her supervisor but is not involved in any decision making regarding such matters. We do not accept that she performs as a member of management on the weekends. Her responsibility is limited to providing access to certain locked areas for the convenience of the remaining hotel staff. She will as necessary assist the room attendants and provide them with additional supplies. We are satisfied she does not exercise managerial functions in accordance with section 1(3)(b) of the Act.
- 18. D. Everitt, N. Kaulback, and P. Talon were listed as Host/Hostess. The hotel operates two restaurants. The evidence of P. Talon indicates that he was in the position of Dining Room Supervisor or Assistant Manager during the period of time up to approximately March of 1990. At that time there was a re-organization in the hotel to the extent that the supervisor position was eliminated and he was re-classified as Host. His primary responsibility involves greeting customers, seating them, dealing with customer complaints and assisting the service staff in ensuring efficient service in the restaurants. He reports to the Restaurant Manager. He could grant time off for example for a doctor's appointment and employees would report to him in the absence of the Restaurant Manager. The Restaurant Manager established the schedules for both Mr. Talon and the other employees in the restaurant.
- 19. Regardless of his earlier title, Mr. Talon was not, at the relevant time, involved in the hiring, firing, lay-off or transfer or discipline of any employee. Nor did he have any authority in that regard. It lay with the Restaurant Manager. Contrary to the submissions of the applicant, Mr. Talon's evidence confirms that his duties did change after his reclassification to Host, although it is also apparent that there was confusion with respect to his title. He apparently continued to wear a name tag indicating his title as Assistant Manager.
- 20. The evidence with respect to Nancy Kaulback's duties and responsibilities is somewhat contradictory. The parties dispute her job title. Ms. Kaulback states she was classified as Dining

Room Supervisor/Hostess or Dining Room Supervisor. The evidence called on behalf of the respondent indicates that her title was Hostess. Her name tag indicated her position as supervisor. She considered herself subordinate to Mr. Talon during the spring of 1990, although it is apparent that they worked somewhat as a team. Much of the discrepancy in the evidence of the duties and responsibilities of Ms. Kaulback and Mr. Talon lies in the fact that the management and organization in the restaurants was undergoing change. Mr. Talon was initially hired as Assistant Manager but acknowledges that in or about March 1990 that position was eliminated and he became a host. That change is confirmed by exhibit 22A. It was Ms. Kaulback's view that Mr. Talon was the Assistant Manager even on the date of application, July 3, 1990. On the other hand Ms. Kaulback was initially hired as a Hostess and her evidence indicates she was promoted to supervisor in the spring of 1990. It was her evidence that she continued in this position until some time after the application date. The change to a supervisor's position is confirmed by exhibit 17. However, exhibit 18 restates her job title as Hostess although she does receive a wage increase. At best, the documentary evidence is ambiguous with respect to Ms. Kaulback's job classification. Exhibit 18 however, is dated within six days of the formal notification to Mr. Talon that he has been reclassified to Host, that is, these events occurred during the reorganization.

- Mr. Nadou was Restaurant Manager between approximately December 1989 to sometime in May of 1990. During that time Ms. Kaulback acknowledges she had less responsibility. It was Mr. Nadou's responsibility to hire, to discipline, to decide whether to retain probationary employees, to transfer employees, and to determine lay-offs and terminations. Any question of whether Ms. Kaulback exercised any authority to make effective recommendations arises from two situations in the evidence. Ms. Kaulback sat in on an interview with Mr. Nadou in respect of a new employee. While it appears that Ms. Kaulback offered an opinion and may have made a recommendation there is nothing in the evidence that indicates whether the individual was in fact hired or not. Ms. Kaulback herself indicates that she sat in on the interview because Mr. Nadou wasn't familiar with the restaurant. It is unclear whether this is referable to the hotel's restaurant in that Mr. Nadou may have been new at the time or whether it was referable to the restaurant at which the perspective employee had worked. In any event, this incident does not weigh heavily to the exercise of managerial authority.
- The second matter involves Ms. Kaulback's purported firing of a new employee. An employee called in on his first day of work to advise that he would not be attending. There is a discrepancy in the evidence as to who took this call. Even accepting Ms. Kaulback's evidence that she took the call and advised the individual that he need not attend for his shifts we are not persuaded that this act amounted to terminating this individual's employment. Ms. Kaulback acknowledges that she immediately informed Mr. Lund, the Assistant General Manager of the Food and Beverage Division at the hotel and subsequently, Mr. Nadou of the call. The evidence as to the nature of the conversation itself indicates that Ms. Kaulback did not understand that she had the authority to terminate someone's employment. We are satisfied that Ms. Kaulback commented abruptly in response to a rude caller. Overall the evidence is more consistent with the conclusion that she then reported the conversation not to advise or confirm to management that she had fired someone but to make sure they knew the circumstances of the event. During the same period some five to ten other people were either laid-off or terminated and Ms. Kaulback played no role whatsoever in those.
- This incident with respect to the employee failing to attend at work must be taken in context of Ms. Kaulback's other evidence wherein she indicates that she did not "do anything without telling Mr. Lund" and in light of certain inconsistencies in her evidence. She states that she could send people home early from work but that it would be at their option. That is, if the restaurant was slow and therefore overstaffed she would not direct a reduction in staffing whereby some-

one might lose pay. Ms. Kaulback stated she could schedule employees. At another point her evidence indicates that she and Mr. Talon would do it together. At another point she indicates she'd make up the schedule, Mr. Talon would approve it and it would go to Mr. Lund. It is apparent from Paul Talon's evidence that to the extent he scheduled people he needed Mr. Lund's approval. It appears that Ms. Kaulback may have had some authority to change the schedule for example if someone called in sick, or to let people go early. She also had some authority to supervise the employees in the restaurant although that authority fell short of involvement in the disciplinary process.

- We are satisfied that the vast majority of Ms. Kaulback's time was spent performing the duties of Hostess and assisting as necessary with bussing and/or relieving the bartender so as to promote the smooth functioning of the restaurant's service. It is not in dispute that other employees classified as Host or Hostess are included in the bargaining unit. Although we have no evidence to compare these individuals' respective duties and responsibilities, on balance, we are not satisfied that Ms. Kaulback performed duties and responsibilities of a managerial nature so as to exclude her from the bargaining unit in accordance with section 1(3)(b).
- 25. Having regard to the agreement of the parties respecting D. Everitt and to our conclusion with respect to P. Talon and N. Kaulback, we find that D. Everitt is also properly included in the bargaining unit.
- 26. It is the position of the applicant that C. Mills and S. Romyn both share a community of interest more closely associated with the office and sales staff than with the employees in the proposed bargaining unit. Mr. Romyn is a member of the accounting department employed under a title of either food and beverage control clerk or food and beverage receiver. His duties involve responsibility for receiving and physically unloading and storing primarily liquor products for the food and beverage area. He also issues and delivers liquor stock to the various bar facilities in the hotel. Mr. Romyn works in the same location as the rooms receiver. Mr. Romyn reports to the Controller. The applicant asserts that this indicates a closer alignment with the office staff. However it is clear that both the rooms receiver and the mini-bar attendant (who are both included in the bargaining unit) also report to the Controller. We place little if any weight on the varying degrees of computer utilization and skills as between bargaining unit employees and employees in the office unit. However we are satisfied that Mr. Romyn's work is more closely associated with the work performed by other members of the bargaining unit in that he acts as a necessary support for that service. To that extent he also interacts with other members in the bargaining unit, whereas he has little if any contact with the office employees.
- C. Mills is described on the employee list as a room checker and on exhibit 9 as administrative assistant. Her evidence identifies her as a housekeeping clerk. Ms. Mills is a member of the housekeeping department and her responsibilities include, primarily, ensuring that the department is properly stocked and supplied. She works in the basement in the housekeeping department with other employees that are included in the bargaining unit. While she does perform certain record keeping functions her primary responsibilities associate her with the service activities of the housekeeping department.
- 28. C. Mills and S. Romyn share a greater community of interest with employees in the proposed bargaining unit than with the office and sales exclusion. Having regard to that conclusion and to the agreement of the parties, we find that:

all employees of the respondent at its hotel located at 970 Dixon Road in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, sales and accounting staff, auditors, reservation agents, guest service representatives,

security staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period,

constitute a unit of employees of the respondent appropriate for collective bargaining.

- 29. For purposes of clarity we summarize our findings that R. Charles, K. Leung, S. Rajaratnam, S. Connelly, R. Singh, C. Agaton, D. Everitt, N. Kaulback and P. Talon do not exercise managerial functions in accordance with section 1(3)(b) of the Act and therefore are properly included in the bargaining unit. Further that C. Mills and S. Romyn share a greater community of interest with employees in the bargaining unit than with office and sales employees and are therefore properly included in the bargaining unit as well.
- 30. Having regard to these findings we hereby direct that the parties meet with the Labour Relations Officer for the purposes of identifying and/or resolving any remaining issues in dispute, failing which, this matter will be scheduled for further hearing. This matter is referred to the Registrar.

1432-91-G Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, Applicant v. Ideal Railings Ltd., Respondent

Construction Industry - Construction Industry Grievance - Whether employer ought to be precluded from imposing suspension for an event which preceded the subsequent discharge (which was ultimately resolved by the parties) - Events giving rise to suspension and discharge distinct and separate - Resolution of one not necessarily resolution of the other - Board, however, considering employer's lack of good faith in assessing appropriate penalty - Board substituting written warning for 5-day suspension - Grievance allowed in part

BEFORE: Bram Herlich, Vice-Chair, and Board Members D. A. MacDonald and E. G. Theobald.

APPEARANCES: N. L. Jesin and R. Balkissoon for the applicant; J. D. Church for the respondent.

DECISION OF THE BOARD; November 5, 1991

- 1. This is a referral of a grievance concerning the interpretation, application, administration or alleged violation of a construction industry collective agreement pursuant to section 124 of the *Labour Relations Act*.
- 2. The applicant (also referred to as the "union") alleges that the respondent (also referred to as the "company" or the "employer") disciplined Oscar Poblete (also referred to as the "grievor") without just or sufficient cause contrary to the collective agreement in force between the parties.
- 3. In coming to its findings of fact the Board has carefully considered all of the evidence before it and taken into account such factors as: the demeanour of the witnesses when giving their evidence, the clarity and consistency of that evidence when tested in cross-examination, the witnesses' ability to recall events and resist the tug of self-interest in shaping their answers, and what seems most probable in all the circumstances.

- At approximately 8:15 a.m. on June 18, 1991 Mr. James Church, president of the company who also functions as plant and operations manager, initiated a meeting with the grievor and Edward Patterson, a union steward. Mr. Church wished to discuss some concerns he had about the grievor's productivity and attendance. Although there were some variations in the evidence of the three participants regarding precisely what transpired at the meeting, we are satisfied that the following description is accurate and adequate for our purposes. Mr. Church's intervention was verbally aggressive. The grievor, whose command of English is somewhat limited (the Board heard his evidence through a translator), responded fairly defensively and emotionally. He requested that someone who could translate be made available to facilitate the conversation. Mr. Church indicated that he felt the union steward's presence was sufficient (there was no suggestion that Mr. Patterson could translate). During the course of this exchange the grievor touched Mr. Church's arm three times and may well have exerted some minimal degree of force in the context of that touching. Mr. Church warned the grievor to stop or he would call the police. That, effectively, was the end of the incident. Although there are some aspects of this incident which we shall review in further detail and there are further events to which we turn shortly, it was on the basis of this incident that the employer, by letter dated July 3, 1991, imposed on the grievor the 5 day suspension which is the subject of the current proceedings.
- 5. A number of events intervened between the meeting described on June 18th and the discipline subsequently imposed on July 3rd. After the meeting on the 18th Mr. Church assigned the grievor to work in a different area. The grievor was not pleased with the assignment and some of the evidence suggested his dissatisfaction may have been tied to safety concerns (the bona fides or merits of which are not pertinent to the present case). Subsequent to the reassignment the grievor left the plant advising the steward (but not Mr. Church) that he was going to seek medical assistance. By June 20th Mr. Church had still not heard from the grievor and accordingly set him the following letter:
- 6. Under Article 9.08(d) of the Collective Agreement, your employment with Ideal Railings Ltd. is terminated, effective immediately.
- 7. Article 9.08(d) of the agreement provides:

Termination of employment and loss of seniority shall be deemed to have occurred if an employee...

is absent for two (2) consecutive work days

without the permission of the company unless

the employee was absent for reasons beyond his control.

8. A grievance dated June 25, 1991 was filed in respect of the termination. In addition, medical notes were provided to substantiate the grievor's absence from June 18, 1991 to July 3, 1991. In response to these, Mr. Church delivered the following communication by fax to Mr. Ron Balkissoon, the union's business representative, late on the afternoon of July 2, 1991:

This is to advise that Mr. Poblete is permitted to return to work, effective immediately; however, letter of termination remains part of his permanent Personnel File and the Union will withdraw the Grievance.

9. The following day Mr. Balkissoon responded to Mr. Church, also by fax, as follows:

Please be advised that after your telephone conversation on the above date [July 2], that I am prepared to settle Mr. Poblete's grievance as follows:

- (a) Mr. Poblete shall be reinstated unconditionally.
- (b) The letter of termination be removed from the grievor's personal file; the grievor to be made whole
- (c) Any wages lost or benefits as of July 3, 1991 shall be compensated by the company
- (d) With the above conditions, the Union agrees to withdraw the grievance without prejudice or precedent

If you have any questions please do not hesitate to contact me, awaiting your response

Later on the same day Mr. Church advised Mr. Balkissoon by fax as follows:

Please be advised that your settlement proposal set out in the above is acceptable to Ideal Railings Ltd.

Subsequent to these events the grievor returned to work and received the following letter from the employer, dated July 3, 1991:

On June 18th, at approximately 8:15 a.m., you physically assaulted a Member of Management. This is not the first incident of this nature and will not be tolerated.

Therefore, you will be suspended for 5 days - July 3rd, 4th, 5th, 8th and 9th. You will return to work on Wednesday, July 10th at 8 a.m.

Any behaviour of this nature in the future will result in termination of your employment with Ideal Railings Ltd.

- 10. There was no objection to the documents filed by the employer regarding the grievor's disciplinary record. In October of 1990 he received a 5 day suspension related to attendance. In the course of receiving that suspension the grievor behaved in an insolent and insubordinate manner which included crumpling the suspension letter he had received and throwing it at Mr. Church. That behaviour resulted in a 2-day suspension imposed early in November of 1990.
- 11. The union's position is essentially twofold. In the circumstances the employer ought to be precluded from imposing any discipline for an event which preceded the subsequent discharge which was ultimately resolved by the parties. The employer ought not to be permitted to "lie in the bushes", resolve the discharge and only then impose further discipline for an incident which predated the discharge. Had the employer been frank and negotiated the discharge grievance in good faith, the union would have been put on notice of the intention to impose further discipline. Alternatively, even assuming that the employer is not thereby precluded from imposing further discipline, the grievor's conduct did not warrant any discipline and certainly not a 5 day suspension.
- 12. The employer's position is equally straightforward. The events which gave rise to the discharge and those which gave rise to the suspension are separate and distinct. Nothing in the resolution of the discharge precludes the subsequent imposition of discipline in respect of different events albeit they occurred prior to the discharge. Furthermore, the union was placed on notice of the employer's intention to impose further discipline during the course of negotiations on the discharge grievance. In any event, even if the grievor's conduct is comparable to minor horseplay, the employer is entitled to view such conduct as meriting a severe response.
- 13. Mr. Church was adamant that he had conveyed his intention to impose further discipline to the union (either through Mr. Patterson or Mr. Balkissoon) prior to the resolution of the discharge. Neither of the latter two individuals confirmed that view; on the contrary their evidence

suggests no such notification was given prior to the resolution of the discharge. Based on the factors considered in assessing credibility outlined above, we accept the evidence of the Union on this point. This finding is also premised on Mr. Church's inability or uncertainty with respect to recalling the meeting at which such notice was given. He initially insisted that the notice was given at a meeting with Mr. Balkissoon. In the face of the latter's denial that such a meeting took place, Mr. Church relented in his claim and asserted that the discussion may have been over the phone. Mr. Balkissoon did not deny that he had discussed the suspension with Mr. Church; he was certain, however, that any such discussion took place subsequent to the resolution of the discharge grievance. When we consider some of the comments attributed to Mr. Balkissoon by Mr. Church (e.g. that Mr. Church was only attempting to "get even" with the grievor), we are further satisfied that these are comments more likely to have been made subsequent to the resolution of the discharge grievance.

- 14. In other words we are satisfied that Mr. Church deliberately and expressly failed to provide any indication to the union or the grievor of his intention to impose further discipline until after the discharge grievance was resolved. We are not persuaded, however, that the employer is thereby precluded from imposing any discipline, if such is otherwise warranted. Nothing in the collective agreement precludes this, nor were we pointed to any other provision of the agreement which would render the company's imposition of discipline as "untimely". Neither was there any suggestion that the employer's conduct was otherwise a violation of the *Labour Relations Act*. Furthermore we accept the employer's submission that the events giving rise to the suspension and the discharge are distinct and separate. Resolution of one is not necessarily resolution of the other. Having said all this, however, the Board is satisfied that the employer's manner of handling this matter was extremely destructive to any semblance of labour relations goodwill which may exist between the parties. Thus, the employer's lack of good faith is a factor we shall consider in assessing the appropriate penalty.
- This brings us to a review of the incident of June 18, 1991 to determine whether any discipline was warranted. Mr. Church acknowledged that he was not knocked over or hurt by the grievor's push. He further acknowledged that the grievor was not intending to hurt him but rather was simply trying to emphasize his point. We are satisfied, however, that the grievor's conduct, somewhere between a vigorous touch and a gentle push, was unwelcome and inappropriate and thus deserving of some discipline. In and of itself we can hardly see how such conduct would have merited more than an oral or a written warning. In the present case, however, there are other factors to consider including the grievor's three years of service, his prior disciplinary record, and the employer's conduct in the matter. In all the circumstances of the case the Board is satisfied that a written warning is just and reasonable.
- 16. The grievance is therefore allowed to the extent indicated. The employer is hereby directed to substitute a written warning for the suspension initially imposed and to compensate the grievor to reflect the altered penalty. The Board shall remain seized with respect to quantum of compensation and any issues arising directly out of the implementation of this award.

3046-90-U Labourers' International Union of North America, Local 1059, Complainant v. London Salvage and Trading Company Limited and Wayne Kummer, Respondents

Discharge - Evidence - Interference in Trade Unions - Practice and Procedure - Unfair Labour Practice - Board not accepting evidence of discussions between parties and Grievance Settlement Officer for same policy reasons that it excludes evidence relating to discussions with Labour Relations Officers - Union alleging that employer committed unfair labour practice by frustrating grievance and arbitration process - Board noting that enforceable collective agreement is the centrepiece of the scheme of collective bargaining contemplated by the Act - Employer's conduct (including reporting grievor's previous accidents to insurer, failure to reinstate grievor pursuant to settlement, and decision to lay him off) violating section 64 by interfering with union's administration of collective agreement - Issue of remedy referred back to parties and Board remaining seized

BEFORE: Judith McCormack, Vice-Chair, and Board Members W. N. Fraser and E. G. Theobald.

APPEARANCES: Mark Lewis and T. DaCosta for the complainant; John W. T. Judson, Terry Kummer and Wayne Kummer for the respondents.

DECISION OF THE BOARD; November 18, 1991

- 1. This is a complaint alleging that the respondents have violated sections 50, 64, 66, 70 and 80 of the *Labour Relations Act* by frustrating the grievance and arbitration procedure in the context of a sequence of events involving two grievances.
- 2. The complainant union and the respondent company are parties to a first collective agreement effective August 1st, 1989 to July 31st, 1991. The company is a small salvage operation connected to the construction industry employing approximately thirty to forty people and the respondent Wayne Kummer is its co-owner and vice-president. Terry Kummer, who is not named as a respondent, is also a co-owner of the company and vice-president of its financial affairs. A third brother, Larry Kummer, also participated to some extent in the events described below.
- 3. The complaint alleges that following the execution of the parties' first collective agreement, the respondents contracted out a truck driver position. This became the subject of a grievance (the "MacKenzie grievance") and ultimately an arbitration award, in which Arbitrator Joyce declared the truck driver to be an employee as of December 8, 1989, unless the parties came to another agreement. The award was issued on May 16, 1990, but to date, there has been no other agreement. In the meantime, the respondents have not treated the truck driver as an employee in the bargaining unit. Counsel for the respondents told the Board that this was because the parties were still negotiating in accordance with the award. He explained the apparent lack of negotiations to date as an error on the part of his own office. In March of 1991, the union referred this grievance back to the arbitrator for implementation.
- 4. In October of 1990, the respondents discharged another truck driver. This matter was also grieved and referred to arbitration under section 45 of the *Labour Relations Act* (the "first Winegarden grievance"). On November 2nd, 1990, the parties met with a grievance settlement officer and reached a settlement which provided for Mr. Winegarden's reinstatement upon receipt of a medical report to the effect that he was fit to continue his truck driving duties. On November 7th and November 30th, the union provided the respondents with medical reports. However, the respondents disputed the sufficiency of the medical reports and declined to reinstate the grievor.

The union referred the matter to arbitration for implementation in accordance with the terms of the minutes of settlement. By an award dated December 31, 1990, Arbitrator Brian Keller found that the medical report dated November 30th, 1990 fulfilled the conditions set out in the settlement and ordered the grievor reinstated.

- 5. However, the grievor was not called back to work, and on January 24th, 1990 the company advised the union's lawyers that Mr. Winegarden was laid off indefinitely. The reason for this lay-off was that the company had notified its insurer of a number of accidents in which Mr. Winegarden had been involved dating back to November of 1989, and the insurance company had advised the respondents that it would have to limit its coverage whenever Mr. Winegarden was driving. The respondents asserted that as a result, Mr. Winegarden could not be employed as a driver, and in the company's opinion there were no alternative jobs for him. The union then filed a grievance ("the second Winegarden grievance") concerning this lay-off, without prejudice to its right to bring the instant complaint.
- 6. At the outset of the hearing, the respondents moved to have the Board defer to arbitration with respect to the matters contained in the complaint. Among other things, counsel for the respondents argued that both grievances were on their way to (or back to) arbitration and referred us to *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254. In response, counsel for the complainant argued that the problem was more systemic than that which could be addressed by individual arbitrators, and that an arbitrator might well have no jurisdiction to deal with the union's allegation in the second Winegarden grievance that the respondents took steps to defeat the grievance and arbitration process by reporting hitherto unreported accidents to its insurers. In addition, an arbitrator might be unable to provide an effective remedy in this second grievance, which might be restricted to the question of whether there was other work available or not, the fact of the insurers limiting coverage not being in dispute. Counsel for the complainant also asserted that no chair had been selected for the second Winegarden grievance because the company's nominee was declining to agree to one as a result of this complaint, an assertion that was disputed by counsel for the respondents. The parties agreed that the lay off issue could not be referred back to Mr. Keller.
- 7. Having regard to the principles set out in *Valdi*, *supra*, the Board ruled orally that it would defer to arbitration on the MacKenzie grievance, as it appeared that the implementation problems besetting it could be adequately dealt with within the confines of the grievance and arbitration proceedings currently instituted. However, because we were concerned about the limitations on both the jurisdiction and the remedial power of an arbitrator with respect to the second Winegarden grievance, and because the allegations asserted a pattern of conduct to defeat the efficacy of the grievance and arbitration proceedings in violation of the *Labour Relations Act* which was unlikely to be directly addressed through arbitration, we determined that we would hear that portion of the complaint that dealt with the Winegarden sequence of events. We then proceeded to hear the parties' evidence and submissions with respect to the merits of that matter.
- 8. Mr. Winegarden was hired by the respondent company in March of 1988 to drive a truck for the purpose of picking up and delivering scrap metal. Both Wayne Kummer and Terry Kummer testified that they knew before they hired him that he had been involved in a serious accident and that he did not wish to do long trucking hauls. Wayne Kummer told the Board in cross-examination that Mr. Winegarden had resigned from his previous job because he became disoriented climbing up onto the bigger trucks to secure the loads, and that that was why he was hired to drive the smaller trucks for the company, and when necessary, the tractor trailers.
- 9. In November of 1989, Mr. Winegarden was involved in an accident driving a company truck. Wayne Kummer described the accident as "not serious", estimating that damage in the

amount of \$2,000 was involved. The respondents did not report this accident to their insurers. Wayne Kummer testified that they were under the impression that they were not required to do so if they were not putting in an insurance claim. They did not file such a claim because the amount of their deductible was \$2,500.00. However, Terry Kummer also agreed in cross-examination that the fact that reporting the accident would increase their premiums crossed his mind at the time, although he told the Board it was not the reason the insurers were not notified. After the accident, Mr. Winegarden reiterated that he did not want to drive long hauls or large trucks because he was getting old and because he got disoriented and dizzy climbing up the loads. As a result, he drove only dump trucks thereafter, although once in a while he drove a load-lugger for the purpose of depositing an empty container.

10. On September 27th, 1990, Mr. Winegarden was involved in another accident in the respondents' yard in which a truck he was driving knocked down part of a chimney. The damage to the truck was approximately \$1,000 and was not repaired, as it involved the truck's bumper which had been damaged previously. The chimney was not repaired either, as the respondents were in the process of assessing whether to tear down the building to which it was attached. At the time of this accident, however, a customer mentioned that Mr. Winegarden had backed into an equipment repair truck the previous month, again in the yard. There was no damage to the company's truck on that occasion, and the equipment repair truck operator had repaired any damage to his truck without charging the company. He had not reported the accident to the company, allegedly at Mr. Winegarden's request, and Mr. Winegarden did not report it either. In light of this information, Wayne Kummer decided to give Mr. Winegarden a letter of warning which stated as follows:

September 27, 1990

Jim Winegarden:

After an extensive analysis of your recent job performance we have come to the conclusion that this letter of warning is warranted.

The degree of damage to company equipment and property and third party property due to your accidents and neglect, has lead to this review.

Accidents in question are:

November 1989 Ripped hole in Van Trailer

August 1990 Hit Ranger Heavy Equipment truck. Accident never reported;

contradiction in Union Contract Article 11, Subsection 11.2 "Employees shall report immediately in complete detail all accidents including the names and addresses of all witnesses to the

accident."

September 27, 1990 Hit Chimney of London Salvage & Trading Co. Ltd. building

Yours truly,

W. Kummer.

11. On September 28th, Mr. Winegarden was involved in another accident in which he broke the mirror and signal light on his truck and dented the front end. At that time, Mr. Winegarden again said that he got dizzy and, Wayne Kummer alleges, said that he had blackouts. After discussing the matter, Wayne, Terry, and Larry Kummer decided to terminate Mr. Winegarden's employment. The termination letter read as follows:

September 28, 1990

Jim Winegarden:

The occurrence of another accident today, backing your truck into another employee's truck, as well as the three accidents cited in the letter dated September 27, 1990 have left us with no other alternative than to terminate your employment with London Salvage & Trading Co. Ltd. effective immediately.

Pick up of your final cheque and record of employment may be done anytime after Tuesday October 2, 1990 and when all company clothing has been returned.

- Both Wayne and Terry Kummer assert that in addition to the reason set out in the letter, Mr. Winegarden was also fired because he was not insurable and because of his dizziness and alleged blackouts. Terry Kummer described a conversation he had with the company's insurance broker in which he put a hypothetical question to the broker to the following effect; if the company had an employee who had had a number of accidents which the company had not reported, and had dizzy spells, what would be the effect on the company's liability if the employee had a serious accident? The broker's advice was to report the accidents, or else the company might become liable for non-disclosure. He referred Terry Kummer to the general conditions in the company's insurance policy which include a term with respect to misrepresentation. The gist of this provision is that if the insured omits to disclose any increase in risk which is likely to materially influence a reasonable insurer, this may avoid the contract at the option of the insurer. There was some conflict in the evidence as to whether this conversation with the insurance broker occurred before or after Mr. Winegarden's termination, which we will examine in greater detail below.
- 13. In any event, the decision to terminate Mr. Winegarden was made on September 28th. Wayne Kummer testified that he told the dispatcher not to send Mr. Winegarden out on the road that afternoon, although Terry Kummer acknowledged that he had in fact been assigned to drive out of the yard. It appears that Mr. Winegarden was actually notified of his termination on October 1st, the following Monday. Sometime shortly after he was terminated, the respondents reported all four accidents to their insurers.
- The union then filed a grievance on Mr. Winegarden's behalf. This was the first discharge grievance which had been lodged against the company since the union was certified. The grievance was referred to arbitration under section 45 of the *Labour Relations Act* and a Grievance Settlement Officer meeting was arranged for November 2nd. The day before the meeting, Wayne Kummer obtained a letter from the insurance broker to the effect that the insurance company did not wish to insure any vehicle Mr. Winegarden continued to drive. It was agreed as a fact that the union was aware of this letter. The parties then entered into minutes of settlement to the effect that Mr. Winegarden would be reinstated to his former position upon receipt of a medical report from Mr. Winegarden's doctor that he was fit to continue his truck driving duties. His record would show a three day suspension, but no compensation would be paid until the day of his reinstatement.
- The respondents sought to lead evidence of discussions between the parties and the Grievance Settlement Officer at the meeting which led to the settlement. More particularly, counsel wished to introduce testimony as to why the respondents had agreed to the settlement for the purposes of deflecting any allegation of bad faith on the part of the company. The Board ruled orally that it would not accept that evidence for the same policy reasons it excludes evidence relating to discussions during the grievance procedure and discussions with Labour Relations Officers. Those reasons include the importance of finality in the grievance process, the harmful impact of failing to treat settlement discussions as confidential, the critical role of the Labour Relations Offi-

cer (and by extension, the Grievance Settlement Officer), the latitude he or she requires to mediate a settlement and the restrictions in the use of extrinsic evidence generally in interpreting written documents. (See, for example, *Crown Electric*, [1978] OLRB Rep. Apr. 344; *Lume Masonry Ltd.*, [1990] OLRB Rep. Aug. 860 and *Lorne's Electric*, [1990] OLRB Rep. Sept. 935). However, in the course of hearing submissions in this regard, counsel for the respondents described in general terms the evidence he wished to lead, and as a result, we are in a position to say that it would not have affected our final decision in any event.

- As noted earlier, the union then submitted two medical reports to the company and both were rejected. Subsequently, the union referred the matter to arbitration under the terms of the minutes of settlement, which provided for this method of enforcement, and Mr. Keller heard the matter on December 19th. On that date, the company attempted to introduce another letter, this time from the insurance company itself. This one, solicited by Terry Kummer, states that the insurance company was limiting coverage on the policy when Mr. Winegarden was driving, that it declined to provide physical damage coverage on any vehicle he drove, and that a premium surcharge was required. The arbitrator refused to admit this letter into evidence and an award reinstating Mr. Winegarden issued on December 31st.
- Subsequently, Wayne Kummer told Mr. Winegarden that he should not report for work, and the company notified the union's lawyers that Mr. Winegarden had been indefinitely laid off. The company asserted that Mr. Winegarden was nominally reinstated in the sense that he subsequently received payment for a small period of time which preceded the lay off. The evidence indicated that the decision to lay Mr. Winegarden off was made by Wayne and Terry Kummer, who testified that the basis of the decision was the November 1st and December 19th letters from the insurance broker and insurance company respectively. Wayne Kummer testified that at least one of the respondents' customers required \$1,000,000 of liability insurance on the part of the respondents' vehicles. He also said that in any event, he would not put a driver on the road with only \$250,000 coverage, this being the limitation imposed by the insurance company. Terry Kummer testified that the respondents had no hesitations about Mr. Winegarden's work otherwise, and said that he was a good, conscientious worker who had been good for the company. He told the Board that he had been prepared to take Mr. Winegarden back in January to alternative employment that is, not as a truck driver. We note, however, that the layoff letter which is dated January 24th states that Mr. Winegarden is laid off because in the company's opinion, there are no other jobs covered by the collective agreement which he can be given.

18. Section 64 of the *Labour Relations Act* provides as follows:

- 64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.
- 19. We turn first to the reasons for Mr. Winegarden's initial discharge. In our view, it is apparent that those reasons did not include anti-union animus. There was no evidence that Mr. Winegarden was particularly active in the complainant union, that he was singled out for special treatment by the respondents, or that his discharge followed closely upon some attempt to assert rights under the Act. Indeed, there were none of the other indicia present from which the Board may sometimes infer unlawful motives of this nature. Having reviewed the evidence in detail, we are satisfied that Mr. Winegarden's employment was not initially terminated in violation of the Act.

- 20. We do have some concerns about the respondents' conduct subsequently, including the reporting of Mr. Winegarden's previous accidents, the failure to reinstate Mr. Winegarden pursuant to the settlement and the decision to lay him off. Those concerns are centered not on any specific discriminatory intent towards Mr. Winegarden personally, but on the difficulty the respondents appeared to have in accepting certain fundamental aspects of their new collective bargaining regime.
- The sequence of events before us illustrates this problem. The first step in that sequence which is alleged to be wrongful is the belated reporting of Mr. Winegarden's accidents to the insurers. The motivation for this step is critical, since the consequences which flowed from it are relied upon by the respondents to defend their subsequent conduct. In this regard, the complainant alleges that the respondents reported the accidents to frustrate the grievance and arbitration process. The respondents, on the other hand, assert that insurance difficulties were in fact the reason for Mr. Winegarden's discharge rather than an afterthought, and that they reported his earlier accidents because they only discovered at that time that they had an obligation to do so. In grappling with the issue of why the respondents reported the accidents, the parties spent considerable time addressing when the accidents were reported, with the implication that this shed light on the respondents' motivation.
- The evidence of Wayne and Terry Kummer in this regard was both vague and conflicting. At one point in his testimony, Terry Kummer said that he had not spoken to the insurance broker until after Mr. Winegarden's termination. On the other hand, Wayne Kummer testified that the termination was based on Terry Kummer's conversation with the broker. Neither the warning letter nor the discharge letter contains any reference to insurance, which tends to reinforce the former's evidence in this regard, particularly in light of the fact that the respondents took pains to raise the insurance issue as a separate ground in subsequent correspondence. In any event, it seems clear from the evidence that the actual reporting of the four accidents did not take place until after the decision to terminate Mr. Winegarden. We also note that even in the initial conversation with the broker, his advice was simply to report the unreported accidents, not, for example, to terminate Mr. Winegarden's services. Looking at the evidence as a whole, we conclude that the issue of insurance arose subsequent to the respondents' decision to discharge Mr. Winegarden.
- 23. If the respondents did not raise the insurance issue until after the termination decision, what was it that prompted their enquiries and the reporting of the accidents at that point? We find it unlikely that the respondents had no previous inkling of the requirement to report accidents whether or not they were making an insurance claim, as they allege. While this assertion has some initial plausibility, it is difficult to reconcile with Terry Kummer's acknowledgement that he was aware that reporting the accidents at the time they happened would have increased the company's premiums, with his position in the company and with his experience and familiarity with insurance matters arising out of his handling of this area for the company for a number of years. In fact, the evidence before us is more consistent with the conclusion that the respondents simply ignored this term of the insurance contract until it suited their purposes for other reasons to report the accidents.
- 24. The respondents also claim that Mr. Winegarden's dizzy spells triggered their concerns about insurance at this point in time. However, the respondents had been aware of Mr. Winegarden's dizzy spells from the time he was hired. We do not find the suggestion by Wayne Kummer that Mr. Winegarden had told him on September 28th that he was also having blackouts to be credible for a number of reasons, not the least of which is that there appears to have been no mention of this until after the first medical certificate had been submitted in November, when it was apparent the company was trying to change the doctor's view about Mr. Winegarden's fitness to drive.

In addition, we find it difficult to believe that the respondents would have sent him out on the road in a company truck to drive again on the afternoon of September 28th, as they apparently did, if Mr. Winegarden had informed them he was having blackouts that morning.

- In other words, both of the reasons asserted for reporting the accidents are subject to serious flaws. At the same time, it is apparent from the evidence before us that the respondents were also having some concerns about the sustainability of the discharge. Indeed, it seems clear that the respondents raised the insurance issue as a means of bolstering their position in the grievance and arbitration procedure hoping, apparently, to use the insurance company's restrictions as a shield to avoid Mr. Winegarden's reinstatement. In this regard, both Wayne and Terry Kummer's testimony indicates that they were under the impression that if Mr. Winegarden was subject to insurance restrictions, they would be able to insulate themselves from the grievance and arbitration process. For example, Terry Kummer acknowledged in cross-examination that the respondents did not intend to take Mr. Kummer back to work by the time the medical reports were submitted, regardless of what those reports said. He evidently believed that the insurance problems allowed the respondents to ignore the subsequent settlement they had entered into. It is difficult to avoid the conclusion that this is precisely why the respondents reported Mr. Winegarden's accidents.
- This conclusion is reinforced by the respondents' conduct. They did not, of course, reinstate Mr. Winegarden pursuant to the settlement, even though the second medical report satisfied its terms. (The parties agreed that we could accept as fact Mr. Keller's findings with respect to the two medical reports submitted.) Similarly, when Mr. Keller ordered Mr. Winegarden's reinstatement, they took steps to circumvent the effect of his award by immediately laying him off for reasons which predated both the settlement and the award. At every stage, they sought to rely on the insurance problems which they had generated by reporting the accidents. Looking at the evidence as a whole, we conclude that they reported the accidents with the idea of sheltering themselves from the grievance and arbitration procedure.
- If all the respondents had done was to attempt to strengthen their case for the purposes of the grievance and arbitration procedure, there might be some question as to whether their conduct, regardless of its labour relations desirability, was a breach of the Act. And in fact it is clear that the respondents were hoping that the insurance restrictions would strengthen their position, first with the union during the grievance procedure and then at arbitration when they tried to introduce the insurance company's letter into evidence. However, the evidence indicates that they went further than that. As noted earlier, the respondents seemed to be under the impression that the insurance problems that resulted from reporting the accidents would place their decision beyond the reach of the grievance and arbitration procedure. Consistent with that impression, they flatly ignored their own settlement. When Mr. Keller directed Mr. Winegarden's reinstatement, they took steps to circumvent the effect of his award by immediately laying him off for reasons which predated both the settlement and the award. We do not find it necessary to decide whether the respondents in fact reinstated Mr. Winegarden when they paid him for a short period of time but told him not to report for work. Whether or not this constitutes reinstatement, there is no question that the effect of the layoff was to essentially nullify the arbitration award. In these circumstances, the form of what the respondents did is less important than its substance.
- 28. In other words, the respondents' conduct went beyond simply attempting to improve their position in the grievance and arbitration procedure, and demonstrated an unacceptable disregard for the procedure itself. Although we have no doubt that a lack of familiarity with the grievance and arbitration system played a role in the respondents' difficulties, it is also clear that they were determined to resist any result of that process which was at odds with their original decision. There is a critical distinction between this type of conduct and a party who is merely buttressing its

position to persuade another party or an arbitrator of its merits. Whether or not after the fact conduct will be admissible or persuasive at arbitration, a party acting in the latter manner is still operating within a context where mutual agreement or an arbitrator will have the final word on the matter. This is quite different from a party who attempts to arrange its affairs and conduct itself so as to render the process essentially meaningless.

- 29. It is not sufficient to assert, as the respondents did, that they reported the accidents because they had a contractual obligation to do so, and that thereafter their conduct was governed by the insurance restrictions. In the first place, we have found as a fact that they reported the accidents for the purpose of insulating themselves from the grievance and arbitration, and not because of their contractual obligation. As a result, they are not entitled to rely on the fruits of their initial actions as a justification for their subsequent conduct. Moreover, the Board does not normally speculate on whether the same consequences might have been obtained had the respondents been properly motivated, and we decline to do so here. In any event, such an exercise if it was useful at all would be relevant to remedy, rather than to whether a violation had occurred by reason of the respondents' conduct.
- 30. Secondly, we are not convinced that the respondents' hands were as tied by the insurance restrictions as they maintain. It was clear that they made little or no attempt to investigate coverage with other insurance companies or in other markets, precisely because they wish to use the restrictions to resist Mr. Winegarden's reinstatement. In these circumstances, even if we take the insurance problems at face value, they do not adequately explain the respondents' subsequent conduct.
- 31. Section 50 of the Labour Relations Act provides that the collective agreement between the parties is binding on the respondents. There was no dispute that that collective agreement contains grievance and arbitration provisions. A conflict resolution process of this nature is so fundamental to a collective bargaining regime in Ontario that if a collective agreement fails to provide for it, arbitration provisions are deemed into the contract by virtue of section 44 of the Labour Relations Act. Indeed, it is fair to say that an enforceable collective agreement is the centrepiece of the scheme of collective bargaining contemplated by the Act. Without a mechanism like the grievance and arbitration process, a union would have no effective way to administer the provisions of its contract. This proposition is given added emphasis in a context where mid-term strikes are banned by virtue of section 72, and where it is generally accepted that the alternative dispute resolution system provided by the grievance and arbitration procedure is the *quid pro quo* for that ban. As a result, it is essential that such a process be meaningful and effective. Against this backdrop, we find that the respondents' conduct violated section 64 by interfering with the complainant's administration of the collective agreement. Given our finding in this regard, it is not necessary for us to determine whether the respondents violated the other sections of the Act pleaded.
- 32. The parties did not address the appropriate remedies in any great length, and having regard to the circumstances before us, we find that it could be useful to give them an opportunity to attempt to settle this issue first. As a result, we appoint a Board officer to assist them in this regard. We remain seized should the parties be unable to resolve any differences in this regard.

3159-90-OH Howard S. Buchin, Complainant v. The Municipality of Metropolitan Toronto, Respondent

Discharge - Health and Safety - Complainant alleging that he was discriminated against and discharged as a result of two work refusals based on health and safety concerns - Board finding complainant's assertions lacking credibility and that circumstances not sustaining even a subjective belief that his safety was endangered - Employer's disciplinary response in these circumstances directed at complainant's insubordination, rather than a *bona fide* work refusal - Complaint dismissed

BEFORE: Judith McCormack, Vice-Chair, and Board Members W. H. Wightman and K. Davies.

APPEARANCES: Howard Buchin and Alba Solsona for the complainant; Colleen Edwards, Mike Moffatt and Uwe Mader for the respondent.

DECISION OF THE BOARD; November 25, 1991

- 1. The name of the respondent is amended to read: "The Municipality of Metropolitan Toronto".
- 2. This is a complaint under section 24 of the *Occupational Health and Safety Act* in which Howard Buchin alleges that he was discriminated against and discharged as a result of two work refusals based on health and safety concerns. At the hearing of this matter, the respondent withdrew its request to consolidate the instant case with a complaint under section 68 of the Act brought by Mr. Buchin against his union.
- 3. Mr. Buchin was most recently hired by the respondent on June 4th, 1990 as a temporary employee with the classification of transfer station operator. He was one of a crew of eight hired to work on a waste composition study to determine the respondent's future waste needs. The study included the delivery of certain garbage loads to the 400 Commissioners Street transfer station which were dumped on the tipping floor. The transfer station attendants would then take samples of the garbage for sorting and weighing. Subsamples would also be collected for analysis by outside consultants.
- 4. On June 13th, employees discovered biomedical waste in the garbage sample they were sorting. One of them, Greg Burke, initiated a work refusal under the *Occupational Health and Safety Act* which involved the entire crew, including Mr. Buchin, proceeding to the lunchroom and remaining there while an investigation was carried out by various officials from the respondent, the union representing employees, health and safety staff and other government personnel. During the process of sorting out the problem, two officials from the respondent spoke to the crew and outlined the proper procedure for health and safety work refusals, including the fact that refusing employees were to proceed to and remain at a safe place nearby during an investigation.
- As a result of this incident, steps were taken to attempt to ensure that no loads containing biomedical waste were delivered to the site, and the crew was directed to wear extensive protective clothing which had been previously issued to them. In addition, their dust masks were redesigned to create a tighter seal. Uwe Mader, who was supervising the crew and who had initially downplayed employees' concerns about the biomedical waste, ultimately apologized to them. No one was disciplined or discharged directly as a result of the work refusal, although Mr. Buchin alleges that he was subsequently subjected to discrimination as a result. Shortly thereafter, the

crew was provided with Workplace Hazardous Materials Information System training in which the proper steps for a health and safety work refusal were reiterated.

- On September 17th, 1990 a front-end loader used in the Commissioners Street building was mistakenly refuelled with gasoline rather than diesel fuel. The mistake was discovered almost immediately and the fuel tank was siphoned by one of the respondent's mechanics at approximately 2:00 o'clock p.m. The drained gasoline was poured into two plastic buckets and a board was placed over the top of the buckets. They were then deposited on one side of the tipping floor approximately thirty feet from the sorting tables where employees were working. Mr. Buchin worked the rest of his shift that day and was absent the following day for unrelated reasons. On September 19th he returned to work. While employees were waiting for a load of garbage to arrive, Mr. Mader directed two employees to transfer the gasoline into proper gasoline containers. In the process, which took place at approximately 9:30 to 10:00 o'clock a.m., we find that several tablespoons of gasoline were spilled on the tipping floor. This was cleaned up with a clay compound designed to absorb substances. The new containers were then placed some sixty or seventy feet from the sorting tables.
- At the 10:00 o'clock break that morning, Mr. Buchin received a call from his wife. He took the call in Mr. Mader's office, and some fifteen minutes later entered the lunchroom where Mr. Mader and other employees were having their break. Mr. Buchin told Mr. Mader that the gasoline fumes were giving him a headache and making him feel ill, and that he was going home. Mr. Mader asked Mr. Buchin to show him what the problem was and the two men went out to where the spill had been. As Mr. Mader was bending down to smell the area, Mr. Buchin left, apparently to go to the locker room. Mr. Mader then asked the rest of the crew to come to the area where the spill had occurred to see if they could smell any fumes. They indicated that they could not. Mr. Mader next proceeded to a nearby building on the premises, the scale house, to find another supervisor and obtain his assessment of the situation. As the two supervisors were approaching the door to the transfer station, Mr. Buchin emerged, wearing non-work clothes and carrying his lunch container. Mr. Mader told Mr. Buchin that he had a right to refuse work that he considered unsafe, but that he did not have the right to leave the premises without authorization, and that he did not have that authorization. Mr. Buchin replied that he would see what the health department had to say about that, and left. Mr. Mader brought the other supervisor over to the floor area where the spill had occurred and the latter advised that he could not detect any fumes either. Mr. Buchin was subsequently suspended indefinitely and then discharged.
- 8. The respondent asserts that Mr. Buchin was discharged as a result of his insubordination on September 19th, 1990 combined with his previous disciplinary record. This included two oral reprimands on June 29th and June 13th, 1990, a Step 1 letter in the respondent's absenteeism program on July 10th, 1990 and a written warning on September 6th, 1990. Both the written warning and the Step 1 letter referred to the possibility of dismissal if things did not improve. In addition, on August 28th, 1990 Mr. Buchin received a written assessment which rated him as "unsatisfactory" and recommended his dismissal if there was no improvement. The respondent's position is that Mr. Buchin's defiance of Mr. Mader's direction was the last straw in the brief employment career of a highly unsatisfactory temporary employee.
- 9. Mr. Buchin asserts that his disciplinary record resulted from a change in Mr. Mader's attitude towards him after the June 13th work refusal, that the gasoline fumes were so dangerous on September 19th that he was justified in not only refusing to work but in disobeying Mr. Mader and leaving the workplace which had become dangerous as a result.
- 10. Sections 23 and 24 of the Occupational Health and Safety Act provide in part as follows:

- 23.-(3) A worker may refuse to work or do particular work where he has reason to believe that,
 - (a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;
 - (b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or
 - (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.
- (4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of his refusal to his employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,
 - (a) a committee member who represents workers, if any;
 - (b) a health and safety representative, if any; or
 - (c) a worker who because of his knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,

who shall be made available and who shall attend without delay.

- (5) Until the investigation is completed, the worker shall remain in a safe place near his work station.
- (6) Where, following the investigation or any steps taken to deal with the circumstances that caused the worker to refuse to work or do particular work, the worker has reasonable grounds to believe that,
 - the equipment, machine, device or thing that was the cause of his refusal to work or do particular work continues to be likely to endanger himself or another worker;
 - (b) the physical condition of the work place or the part thereof in which he works continues to be likely to endanger himself; or
 - (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention continues to be likely to endanger himself or another worker,

the worker may refuse to work or do the particular work and the employer or the worker or a person on behalf of the employer or worker shall cause an inspector to be notified thereof.

- (7) An inspector shall investigate the refusal to work in the presence of the employer or a person representing the employer, the worker, and if there is such, the person mentioned in clause (4)(a), (b) or (c).
- (8) The inspector shall, following the investigation referred to in subsection (7), decide whether the machine, device, thing or the work place or part thereof is likely to endanger the worker or another person.
- (9) The inspector shall give his decision, in writing, as soon as is practicable, to the employer, the worker, and, if there is such, the person mentioned in clause (4)(a), (b) or (c).
- (10) Pending the investigation and decision of the inspector, the worker shall remain at a safe

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place near his work station during his normal working hours unless the employer, subject to the provisions of a collective agreement, if any,

- (a) assigns the worker reasonable alternative work during such hours; or
- (b) subject to section 24, where an assignment of reasonable alternative work is not practicable, gives other directions to the worker.
- (11) Pending the investigation and decision of the inspector, no worker shall be assigned to use or operate the equipment, machine, device or thing or to work in the work place or the part thereof which is being investigated unless the worker to be so assigned has been advised of the refusal by another worker and the reason therefor.

- 24.-(1) No employer or person acting on behalf of an employer shall,
 - (a) dismiss or threaten to dismiss a worker;
 - (b) discipline or suspend or threaten to discipline or suspend a worker;
 - (c) impose any penalty upon a worker; or
 - (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the Coroners Act.

- (2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply with all necessary modifications to the complaint.
- (3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 89 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act.
- (4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), sections 102, 103, 106, 108 and 109 of the *Labour Relations Act* apply with all necessary modifications.
- (5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.
- (6) The Ontario Labour Relations Board shall exercise jurisdiction under this section on a complaint by a Crown employee that the Crown has contravened subsection (1).
- (7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.
- 11. In Inco Metal Co., [1980] OLRB Rep. July 981, the Board in considering the predeces-

sor to these sections said that it "must interpret and apply the Act bearing in mind the shortcomings of the pre-existing law that it was designed to remedy". After reviewing those shortcomings at some length, together with the social and human toll taken by industrial accidents and their adverse impact on the economy, the Board concluded that the predecessor provisions "must be given a liberal and constructive interpretation that is consistent with the intent of the legislation".

- 12. Similarly, the Board observed in *The Corporation of the City of Toronto*, [1986] OLRB Rep. Dec. 1834:
 - 62. We also agree that the Board should not put an unduly rigid construction on the terms of section 23(1), lest employees be discouraged from raising safety issues at the work place. That would be inconsistent with the scheme of the Act. Section 23 is designed to promote and protect employee prudence, while at the same time, providing a mechanism for resolving legitimate concerns through a process of discussion with the employer, and, if necessary, the assistance of a "neutral" official of the Ministry of Labour. It is both proper and desirable that employees should be able to voice their safety concerns without fear of penalty or reprisals.
- 13. The Board has commented that initially an employee may refuse work which he or she has reason to believe is unsafe, a test which is subjective in its nature (see, for example, *The Corporation of the City of Ottawa*, [1986] OLRB Rep. June 798). Where there is such a refusal, the employer is required to investigate the matter forthwith in the manner set out in section 23. Following that investigation or steps taken to deal with the circumstances that prompted the work refusal, the worker may continue to refuse if he or she has reasonable grounds to believe that the work is unsafe. The Board has concluded that this subsequent test is an objective one, and has adopted this enunciation of the test set out in *Inco Metals*, *supra*, with respect to the predecessor legislation (see, for example, *Camco Inc.*, [1985] OLRB Rep. Oct. 1431):
 - 59. On a complaint such as this, therefore, in considering whether an employee had reasonable cause to refuse to work in a given situation, this Board must ask itself whether the average employee at the work place, having regard to his general training and experience, would, exercising normal and honest judgement, have reason to believe that the circumstances presented an unacceptable degree of hazard to himself or to another employee.

Where the worker continues to refuse, an inspector is required to investigate the refusal in the presence of the employer, the worker and an employee representative after which the inspector gives his or her decision in writing to the parties.

- 14. The Board has held that the reasonableness of an employee's belief may be affected by an inspector's decision. (Auto Jobbers Warehouse Ltd., [1981] OLRB Rep. Dec. 1715.) In this regard, the Board has noted that an employee is entitled to continue to refuse to work even after an inspector's report declares the workplace to be safe as long as he continues to have reasonable grounds to do so. However, a worker who refuses to work where there has been an investigation and a decision by a neutral expert that the work is safe faces an increasing onus with respect to the reasonableness of his or her position (see Canadian Gypsum Construction, [1978] OLRB Rep. Oct. 897). That onus is still subject to the general burden of proof that the employer bears under section 24 (see The Corporation of the city of Toronto, supra).
- 15. At no stage must an employee be proven correct with respect to the safety of the work. Rather, in *Inco*, *supra*, the Board said that it will look at the reasonableness of the employees' views in light of the information available to the worker at the time of the refusal:
 - 60. The ability of an employee to invoke the right to refuse work does not depend on whether there is in fact any danger. The question is whether at the time an employee refuses to perform his work he has reasonable cause to believe that it is unsafe to do so. The fact that it may later be shown that there was no real danger at the time an employee refused to work doesn't mean

that the employee was wrong in exercising his right under the Act. The events must be assessed in the light of knowledge available at the time that the employee refused to work.

See also Imperial Oil Ltd., [1982] OLRB Rep. Apr. 580, and Wilco Canada Inc., [1983] OLRB Rep. Oct. 1759 in this regard.

- 16. With this in mind, we turn first to the allegations that Mr. Buchin was discharged because he acted in compliance with the Act or sought its enforcement. To determine this, we must initially examine whether he had reason to believe that the workplace was likely to endanger himself. The reason Mr. Buchin advanced on September 19th for his work refusal was that he had a headache and was feeling ill because of gasoline fumes. At the hearing, he raised a number of additional problems about the flammability of the gasoline and the inappropriateness of storing it in the buckets for this reason. However, these additional reasons were not concerns he expressed to anyone on September 19th or at any time previously, and it is clear that they were essentially afterthoughts. Since we find as a fact that they did not prompt his work refusal, we are not prepared to determine the reasonableness of his beliefs in this regard. Rather, we turn our analysis to the problem that he identified at the time of his work refusal, that is, that he was feeling ill and had a headache because of fumes from the gasoline.
- Mr. Buchin acknowledged that when the gasoline was transferred for the second time, 17. that is on September 19th, it was transferred into appropriate gasoline containers and that he was not concerned about fumes emitting from those containers. Rather, his concern was with respect to alleged fumes from the spill on the floor and from the gasoline while it was sitting in the plastic buckets. We note that Mr. Buchin apparently completed his shift on September 17th while the gasoline was in buckets without feeling the need to refuse to work and without raising any concerns whatsoever with his supervisor that day. He was absent the next day, but it appears did not raise any concerns upon his return to work the following day prior to the second transfer of gasoline. The evidence indicates that the Commissioners Street building encloses a large open area approximately two hundred feet long with ceilings which are some twenty feet high. There are ceiling to floor doors which are large enough to permit dump trucks to enter and exit, and which remained open during the period in question. Typically, air circulation is facilitated by the location of the building on the lakefront. In addition, the building has a number of windows in it, many of which are broken. In these circumstances, and having regard to the fact that the gasoline was covered, the large and open nature of the work area, the ventilation provided by the floor to ceiling doors at each end, and the location of the buckets relative to where employees were working on the sorting tables, we are not prepared to accept that Mr. Buchin was either reasonably or sincerely concerned about inhaling fumes while the gasoline was in the buckets.
- 18. As a result, the issue narrows to whether any fumes resulting from the spill on the floor would result in a reasonable belief that Mr. Buchin's health or safety was endangered. Having reviewed the evidence at some length, we find ourselves left with considerable doubt in this regard. In the first place, the amount spilled was very small and it was cleaned up shortly thereafter. The floor had been treated previously with a substance to render it less permeable, although no doubt some minute gasoline residue still remained on it. However, even Mr. Burke, who led the June 13th work refusal, testified that he could not smell any fumes in the area at the time in question. This is consistent with the large and open nature of the work area and the ventilation provided by both the floor to ceiling doors and the windows.
- 19. We are also somewhat skeptical of the *bona fide* nature of Mr. Buchin's refusal. What we find most troubling is the fact that he went home, rather than retreating to the lunchroom or other safe place. He was perfectly aware of the proper procedure in this regard, both because of the June 13th work refusal and because of the briefing session and the WHMIS training which fol-

lowed it. Mr. Buchin asserted that in his view, the alleged fumes were so dangerous that it was necessary to leave the premises entirely. This is not borne out by the evidence and does not explain why he did not wait outside the building or even in the scale house some distance away.

- 20. The fact that he proceeded home so promptly after receiving a call from his wife, in defiance of his supervisor's direction and in spite of his admitted knowledge that this was not the proper procedure for a work refusal raises serious doubts about the sincerity of his belief. It is simply nonsensical to suggest, as Mr. Buchin does, that whatever minute residue remained on the floor from several tablespoons of gasoline rendered the entire building so dangerous that it was necessary for him to leave the premises. In short, we conclude that Mr. Buchin's assertions lack credibility, and that the circumstances before us do not sustain even a subjective belief that Mr. Buchin's safety was endangered. As a result, the subjective test has not been met. It is far from clear that Mr. Mader's investigation met the conditions which would trigger the application of an objective test to Mr. Buchin's refusal. However, if it did, and if Mr. Buchin's proceeding home can be characterized as a continuing work refusal, we find that that objective test has not been met in these circumstances as well.
- 21. The employer's disciplinary response in these circumstances was directed at Mr. Buchin's insubordination, rather than a bona fide work refusal. It was clear that there was some friction between Mr. Mader and Mr. Buchin at the best of times and that Mr. Mader had warned Mr. Buchin both orally and in writing on a number of occasions previously about his work performance, attitude and absenteeism. Having regard to his disciplinary record, the fact that he was a temporary employee, his short service with the respondent and the events which triggered the discharge, the employer's response was not excessive in a way that would suggest some improper motive to us.
- However, Mr. Buchin also asserts that his disciplinary record itself was prompted by the June 13th work refusal. Again this assertion is simply not supported by the evidence. Among other things, we note that Mr. Buchin's role in that refusal was no different than that of the rest of the crew and considerably less than that of Mr. Burke. No one else was disciplined subsequently as a result, and Mr. Buchin did not suggest any reason why he would be singled out for special treatment. Indeed, the evidence of Mr. Burke is that Mr. Buchin was not treated any differently after the first work refusal. It was apparent that Mr. Buchin felt that Mr. Mader was "riding" him. Without commenting on whether or not this was the case, we find no connection between it and the June 13th work refusal.
- 23. Finally, having regard to all the circumstances of this case, we do not find it appropriate to exercise our discretion under section 24(7) to substitute another penalty.

2412-91-G Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, Applicant v. Novo Mundo Construction Ltd., Respondent

Construction Industry - Construction Industry Grievance - Union alleging, inter alia, delinquent remittances - Collective agreement requiring employer to pay all costs of collection - While employer acknowledging liability for a significant sum, certain elements remaining in dispute -Board directing employer to pay union in respect of unpaid benefits' contributions and related delinquency payments - Employer also directed to pay union \$1,000 in respect of collection costs

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members J. A. Rundle and J. Redshaw.

APPEARANCES: Bernard Fishbein, John Zanussi, John Robbins and Ian Beard for the applicant; John Baker for the respondent.

DECISION OF THE BOARD; November 18, 1991

- This is an application under section 124 of the *Labour Relations Act*. The applicant ("the trade union") contends that the respondent (sometimes referred to herein as "the company") has failed to comply with the terms of a collective agreement by which it is bound. The claim has two components. The union contends that the company has failed to remit many thousands of dollars to the vacation pay, pension, welfare, training, and benefit funds established by the agreement. This claim includes both the amounts of unpaid contributions (based upon the number of hours that the employees worked), and certain amounts by way of liquidated damages calculated in accordance with the formula prescribed in the agreement. The other aspect of the case involves the "lay-off" of A. Larsen. The union claims that Mr. Larsen did not receive his final pay cheque and employment records in the manner required by the agreement.
- 2. The company was advised of these various claims by letter from counsel for the union dated August 10, 1991. This application was filed on October 22, 1991.
- 3. Pursuant to section 124 of the Act, the Board is obliged to schedule a hearing expeditiously, however, in accordance with its usual practice, the Board appointed a Labour Relations Officer to meet with the parties and endeavour to effect a settlement. A meeting was scheduled for November 1, 1991. The company did not attend. Nor did the company file its Reply until the morning of the hearing. Accordingly, as late as the morning of the hearing, there was no payment of any amounts owing, nor any formal admission of liability, in respect of all or any part of the union's claim. On the morning of the hearing, the company did acknowledge liability for a significant sum, but certain elements remained in dispute, and were addressed at the hearing. After closing argument, the company raised a further disagreement about the method of calculating the amounts owing.
- 4. We will return later to the significance of this course of events.
- 5. The company does not dispute that it is bound by the provincial collective agreement between The International Union of Bricklayers and Allied Craftsmen and The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and The Masonry Industry Employers Council of Ontario.
- 6. Our findings of fact are based on our assessment of the relative credibility of the three witnesses who gave evidence: Mr. Larsen, Mr. John Zanussi, an official of the union, and John

Baker, an official of the company. We have given no weight at all to certain (hearsay) comments attributed to a Mr. Fernandes, a supervisor for the company who was not called as a witness. We have also attributed no weight to assertions in the company's Reply that were not supported by the evidence led before us.

7. It will be convenient to deal with the matters in dispute one by one.

The Lay-Off of A. Larsen

- 8. Mr. Larsen is a former employee of the respondent. He was scheduled to work on Friday, October 4, 1991. At about 6:30 a.m., foreman Fernandes called him at home, and told him not to come in to work. Mr. Fernandes did *not* offer alternative work, nor did anyone from the company question Mr. Larsen's absence on Friday, or the following Monday. Contrary to the company's assertion, the evidence does not establish that Mr. Larsen was being "demoted" or transferred to another job. His employment was being terminated.
- On Tuesday, October 8, Mr. Larsen came to the company's premises to pick up certain money that he was owed, together with the documents relating to his termination. This meeting was not initiated by the company. It was arranged by Mr. Larsen himself, because the company had previously given him a pay cheque that was dishonoured "NSF", and Mr. Larsen was anxious to secure a replacement. The company indicated that it would be prepared to re-employ Mr. Larsen in another position, but Mr. Larsen declined. He was given a "separation slip" prepared pursuant to the Federal Unemployment Insurance legislation. That document indicated that he had been "laid off... [because of a]... shortage of work".
- 10. In the construction industry, employment is transitory, with workers regularly moving from contractor to contractor, and job to job. In that context, it is not unusual for construction collective agreements to carefully prescribe the way in which employees are hired or released. This collective agreement is no exception. Article 13 reads as follows:

ARTICLE 13

Lay Off and Quittance

- (a) One hour's advance notice shall be given and paid for whenever employees are laid off or dismissed. Lay off shall only take place at the end of the regular working day/or designated shift except for incompetency. Employees shall receive their pay and record of employment at the time of lay off and be permitted to leave the job after notice is given.
- On Refractory shift work as outlined in Article 22, should job completion on a designated shift be less than eight (8) hours, then the Employee(s) shall receive a minimum of eight (8) hours pay at the designated shift rate. If job completion on a designated shift exceeds eight (8) hours then the Employee(s) shall receive a minimum pay of the designated shift rate as if the entire shift were worked.
- (b) Any Employee who voluntarily leaves his employment shall have his wages and record of employment by the next regular pay day.
- (c) Employees who do not receive their pay and record of employment at the time of lay off shall receive two (2) hours pay at the regular hourly rate for each working day or designated shift until such time as the Employer mails the Employee's pay by registered or certified mail. The days for which the allowance of two (2) hours is paid shall not include the day on which the Employee's pay was mailed. In the case of work carried out under the refractory conditions (Article 21) employers must issue layoff pay and necessary forms within 48 hours, except weekends and holidays.

The terms of Article 13 are unambiguous.

- 11. Mr. Larsen was not laid off "at the end of the regular working day" as required by Article 13; moreover, the evidence put before us does not establish that he was laid off for incompetence. Mr. Baker was not on the job site and therefore was not in a position to give evidence of his own knowledge about Mr. Larsen's work performance. Mr. Fernandes, the job supervisor, did not give evidence at all. Mr. Larsen was not told that he was being laid off for poor work performance. The Unemployment Insurance document prepared by the company specified that he was being laid off for lack of work. The alleged incompetence issue arose only after the filing of this grievance, and is simply not supported by the evidence.
- 12. Mr. Larsen was not laid off "at the end of the regular working day" as required by the agreement. He did not receive his final pay or records of employment at the time of his lay-off on Friday, October 4, and the company did not mail those documents to him. It is unclear when (or whether) he would have received them had he not come to the office on his own initiative to seek a replacement; but clearly, he did not receive them in accordance with Article 13(a) and (c) of the agreement.
- 13. We find therefore that Mr. Larsen is entitled to one day's pay for Friday, October 4, and two hours' pay for two days pending receipt of his employment records. That amount is \$356.52. The company is directed to remit this sum to Mr. Larsen forthwith.

Hours Worked and Paid on September 26

- 14. On September 26 it rained. Some company employees went home. Others continued to work, depending upon whether their work area was sheltered, or they could find work to do inside the building they were constructing. Mr. Larsen recorded the times of those who completed their shift and those who went home early. Those time sheets were forwarded to the company. The company appears to have disregarded them. For nine employees the company unilaterally deducted one hour's wages, even though those employees actually continued to work despite the rain.
- 15. There is no evidentiary basis for this deduction. On the contrary. The credible and uncontradicted evidence of Mr. Larsen is that the nine employees worked the hour in question, and the company simply disregarded the time sheets, and refused to pay them.
- 16. There is no claim in this grievance for the lost wages; however, this nine hours must be included in the total of hours worked and earnings for the purpose of benefits calculations. The benefits are linked to the employees' hourly earnings, because the payment formula allocates "so many cents per hour" to each of the benefit funds.

Delinquent Remittances and Collection Costs

As we have already mentioned, employment in the construction industry is transitory, with tradesmen moving regularly from job to job and employer to employer; and the provincial collective agreement covers literally hundreds of employers for whom unionized tradesmen may work from time to time. An individual tradesman may not have any long-term attachment with any one company, but will move from one to another in accordance with local construction conditions and the vagaries of the market-place. That is why employee benefit funds are established on an *industry* basis, with each employer making contributions in accordance with the earnings of the tradesmen which they have in their employment from time to time.

- Unfortunately, not all companies comply with these contractual obligations, however clearly they may be spelled out in the collective agreement. The fact is, that small companies regularly "cheat" or "short change" their workers (especially in lean times), with the result that each year unions are required to file with the Board hundreds of section 124 applications in order to collect amounts claimed to be owing. Sometimes these amounts are quite small so that the union must balance whether the costs of the legal proceeding outweigh the benefits accruing to individual employees bearing in mind that tolerance of delinquency deprives union members of money to which they are entitled, gives an unfair competitive advantage to contractors who "cheat", and may feed estoppel arguments if non-compliance is condoned. Despite the relative informality and expedition of section 124 proceedings, there are litigation costs necessarily associated with collecting amounts which may be owing.
- 19. We might note, parenthetically, that it was not always that way. Prior to what is now section 124 of the Act, and lacking any expedited arbitration procedure, trade unions typically compelled adherence to the terms of the collective agreement by simply striking or picketing employers who did not comply. Such actions were illegal, of course, but they provided employers with a real incentive to comply and unions with a highly-effective remedy if they did not. Section 124 is now the statutory alternative, substituting litigation for industrial action, but also escalating the costs of collection. Article 20 of the collective agreement addresses this problem:

ARTICLE 20

Delinquent Remittances - Penalties

When remittances in accordance with Articles 17 and 19 are over ten (10) days in arrears, the Employer shall pay to the Trustees, as liquidated damages and not as a penalty, an amount equal to two (2) percent per month, or portion thereof up to twenty-four (24) percent per annum of such delinquent contributions, unless the Employer has corrected such delinquency within five (5) days of being given written notice.

In addition, the delinquent employer shall be required to pay all costs of collection of such liquidated damages and may be required, upon request of the Trustees, to deposit with the Trustees a Cash Deposit, Irrevocable Letter of Credit or Equivalent Acceptable Security to a maximum of Ten Thousand (\$10,000.00) Dollars.

Should a delinquent Employer refuse to pay the penalty herein provided, it is agreed the Employees of such delinquent Employer may refuse to work for such Employer until the Employer has complied with all obligations regarding remittances and/or penalties.

Refusal to work by Employees shall not be a violation of this agreement or an unlawful stoppage of work within the provisions of the Ontario Labour Relations Act, and the Employer shall not institute or commence any applications, actions or proceedings of any nature whatsoever under the Ontario Labour Relations Act, this Agreement or otherwise against the Union or any of its Officers, Officials, Servants, Employees, Agents or Members in connection with any such refusal to work.

20. In our opinion, the provisions respecting Benefits (particularly Articles 17, 19, 28, 29 and 20) must be read together since the terms are interrelated and refer to each other. In our opinion, the remittances referred to in Articles 20, 17 and 19 are as defined in those provisions, together with the details included in Article 29. Article 29 sets out in table form, a precise schedule of deductions and contributions. Article 17 specifically references, among other things, the schedule contained in Article 29 which, in turn, includes contributions to the vacation pay trust fund defined in Article 28. Likewise, Article 28 governing the Vacation Pay Trust Fund refers specifically to the schedule contained in Article 29. It is evident, therefore, that for the purposes of Article 29 is and 20 in the purpose of Article 29 in the schedule contained in Article 29. It is evident, therefore, that for the purposes of Article 29 is and 20 in the purpose of Article 29 in the purpose of Article 29

cle 20, the benefit package is to be considered as a whole. The "remittances in accordance with Articles 17 and 19", include those defined in Articles 28 and 29.

- We do not accept the company's assertion that delinquency payments have no application to the company's failure to make Vacation Pay contributions. On the contrary, it is our view that if an employer is delinquent in *any amount*, in respect of *any* of the benefits' contributions spelled out in Articles 17 and 19 (and by reference Articles 28 and 29), liquidated damages are payable in the amount stipulated in Article 20. And if the union is obliged to incur collection costs, it is entitled to recover them even if the unpaid amounts are relatively small. An employer who refuses or neglects to pay amounts owing under the collective agreement runs the risk that if its position is not sustained, it may be obliged to pay the costs of collecting amounts found to be owing.
- 22. How does Article 20 apply here?
- 23. The company did not acknowledge, pay, or agree to pay, amounts owing as of October 10 when the trade union grieved the alleged violation of the agreement, and warned of its intention to take proceedings under section 124 of the Act. In the weeks following the grievance, the company did not pay any of the amounts which it now agrees to be owing; and lest there be any misunderstanding, we do not think that the union was obliged to accept anything less. In particular, the union was not obliged to forego legal action because of a mere promise to pay, or because the company tendered an explanation of why it had not paid. An explanation or promise to pay is not payment, and, meanwhile, the benefit funds are deficient in the amount owing, to the potential prejudice of an employee who may be forced to make a claim against those funds. An employer is not entitled to finance its cash flow shortages or business operations out of the pocket of its employees or the trust funds established for their benefit.
- We have some doubt about whether there would have been any acknowledgement of any amounts owing had the trade union not filed this application, pressed the matter to a hearing, and served Mr. Baker with a subpoena requiring him to produce the company's business records. We note, for example, that the company did not attend the settlement meeting of November 1, 1990. If it had intended to settle prior to a hearing, it had ample opportunity to do so. It was not until the morning of the hearing that Mr. Baker tendered cheques in respect of certain amounts owing, and there was still a dispute as to the total amounts owing, which, in turn, necessitated a hearing. There was neither full payment nor an agreement to pay the full amount of the claim; and it was not unreasonable for the union to demand either full payment by certified cheque, or a clear and complete acknowledgement which could be embodied in an enforceable Board order.
- We find in this case that, in order to ensure compliance with the terms of the collective agreement, the trade union has been required to retain and brief counsel, launch this proceeding, subpoena the company's records, interview and ensure the attendance of witnesses, attend at the Board for a hearing, and proceed to a hearing. The costs of this exercise are significant; but to avoid quibbling about quantum, the union is content to restrict its claim under this heading to \$1,000.00. In our opinion, that amount is both reasonable and authorized by Article 20. The Board therefore directs that the respondent forthwith pay to the union the sum of \$1,000.00 in respect of the costs of collecting the liquidated damages defined in Article 20.
- 26. Counsel for the union and the representative of the employer tendered a document setting out the amounts agreed to be owing, together with alternative calculations depending upon whether one or other of the company's disputes is accepted. Since we sustain none of them, we find that the entire amount is owing and should be paid, together with the "costs item" mentioned

above, and the wages owing to Mr. Larsen in respect of the company's failure to comply with Article 13 of the agreement.

- 27. On the basis of the parties' evidence and representations, the Board therefore directs:
 - (1) that the respondent pay to the union in respect of unpaid benefits' contributions and related delinquency payments the amount of \$52,916.15;
 - (2) that the respondent pay to the union in respect of its collection costs, the sum of \$1,000.00;
 - (3) that the company pay to Mr. Larsen the sum of \$356.52 in respect of wages and related payments owing pursuant to Article 13 of the agreement.
- 28. These amounts must be paid forthwith.

2288-91-G IBEW Electrical Power Systems Construction Council of Ontario, Applicant v. Electrical Power Systems Construction Association and **Ontario Hydro**, Respondents

Construction Industry - Construction Industry Grievance - Remedies - Employer discovering error in payment of travel allowances and paying affected employees for distances travelled since 1984 in accordance with collective agreement - Union filing grievances claiming interest on "back travel money" -Board noting that equitable jurisdiction to award interest does not come to life unless violation of collective agreement has been found - Board finding no collective agreement violation at time of the grievance - Furthermore, under all the circumstances, Board would have declined to award interest in this case - Grievance dismissed

BEFORE: Paula Knopf, Vice-Chair, and Board Members J. Lear and J. Redshaw.

APPEARANCES: L. A. Richmond and W. Bray for the applicant; Neal B. Sommer, Peter Watson and Lesley Hall for the respondents.

DECISION OF THE BOARD; November 8, 1991

- 1. This is an application filed under section 124 of the *Labour Relations Act*.
- 2. There is no dispute over the facts. Under the parties' collective agreement, the employer has an obligation to pay travel allowance to employees living within a certain designated radius of a project. As a result of collective bargaining negotiations in 1984, these "travel rings" defining the radius around certain projects were drawn. On the basis of those designated travel rings, the travel allowances were paid. However, in 1990 the employer came to the realization that an error had been made with respect to the Bruce Nuclear Hydro Project. The result of this error was that several employees in the area who were entitled to the travel allowance had not been paid that allowance. Other employees had been overpaid. Hydro took no corrective action with regard

to the over payments. However, with regard to the employees who had not received their proper travel allowance, Hydro made payments to those employees for the distance they had traveled since 1984 in accordance with the collective agreement. The monies paid to the employees in this bargaining unit ranged from \$32,200 to approximately \$12,000. All the payments were made by May of 1991.

- 3. In June of 1991 the union filed the grievances which give rise to this hearing. The grievances relate to the collective agreement back to 1984 claiming "interest at the appropriate rate on the back travel money for all Local 1788 members affected by the employer's action" i.e., the non-payment of the travel allowances in accordance with the collective agreement. Thus, the union comes before the Board claiming interest on the travel allowances.
- 4. The union began its argument by emphasizing the consistent line of Board and arbitral jurisprudence which establishes the principle that interest is awardable as a result of the breach of the collective agreement. Specifically, reference was made to the *Beckett Elevator Company Limited* case, [1983] OLRB Rep. Sept. 1391 at paragraph 29 where the Board said:

... an interest component is an important aspect of the measure of damages when an aggrieved party is able to establish that a sum of money should have been paid some months or years before. The interest component is not a penalty. It is part of the compensation for the loss incurred, and that there is a cost or loss arising when money is not paid on time is obvious to anyone who has worried about the size of his accounts receivable....

Counsel for the union cited the following cases as a authorities for the fact that interest is not only awardable but has become a "common place component" of compensation awards. *Hawker, Siddeley Canada Inc.*, (1990) 12 L.A.C. 4th 251; *Mountain King Productions, Inc.*, (1988) 3 L.A.C. 4th 286; *M. Concrete Forming*, [1991] OLRB Rep. Feb. 225; *Dessmark Construction*, [1991] OLRB Rep. May 614.

- Counsel for the union also stressed that nothing in the collective agreement precludes the award of interest. He went further to argue why interest ought to be awarded in this case. It was said that the collective agreement provisions for travel allowance must be considered as an important part of the employee's compensation package. It was stressed that the employees affected by this grievance had traveled the distance but had not been compensated for their trouble. The union stressed that it had relied on Hydro's measurement of the travel radius and that this trust should not result in any detriment to the individual employees. The union acknowledged that Hydro's mistake was made in good faith and expressed appreciation of Hydro's voluntary payment to the employees once the error was discovered. However, it was stressed that for more than six years before the error was discovered, Hydro had the use of the money and the employees did not. It was argued that denying the grievor's interest on the travel allowance would amount to a denial to the employees of the full compensation guaranteed to them by the collective agreement. Counsel also stressed, giving reference to the C.P.I. figures over the relevant years, that these employees would be paid in 1991 dollars for monies owing to them since 1984 and thus are incurring a loss in real dollar terms for the money rightfully owing to them. Thus, it was said that even with interest, the employees would not be fully compensated if their grievance succeeded. It was stressed that interest is to be considered a component of compensation and not as punishment. It was submitted that if we did not award interest because of the fact that Hydro paid voluntarily this would amount to a concept similar to relieving Hydro from the penalty which is not an appropriate way of characterizing the case. Thus, we were asked to award interest and direct Hydro to pay to all employees interest in accordance with Practice Note 13 and to remain seized with the matter.
- 6. Counsel for Hydro argued that what the union is seeking in this case is not something

that can be considered a matter of grievance or arbitration. Counsel for the employer stressed that all the cases relied upon by the union wherein interest were awarded were based upon findings in the first instance that a breach of the collective agreement had occurred. Only when damages were awarded was interest then awarded. It was said that on the facts at hand an award of interest is not appropriate because at the date the grievance was filed no violation of the collective agreement existed because the monies payable under the previous collective agreements had been paid and there was nothing left outstanding.

- 7. Further, or in the alternative, counsel for the employer stressed tha awards of interest are considered equitable remedies. Thus, the Board was urged to look at all the circumstances of this case. We were asked to consider that the union should share some responsibility for the fact that its members rights were violated by virtue of their failure to check the accuracy of the maps. It was said that the union sat on its rights to enforce payment of the money or interest. Further by way of equitable considerations, the employer asked us to consider the fact that Hydro had actually overpaid some employees because of its error and had not reclaimed any of those monies.
- 8. Further, or in the alternative, counsel for the employer referred us to the case of Ontario Hydro, [1987] OLRB Rep. Apr. 574 which dealt with the union's attempts to grieve violations of the collective agreement during contracts prior to the collective agreement at hand. On the principles of that case, the employer argued that if interest were to be awarded, at the most is should only cover the collective agreement under which the grievance was filed and no previous collective agreements.
- 9. By way of reply argument, counsel for the union argued that the previous *Ontario Hydro* case was distinguishable because the union in that case had failed to be vigilant about enforcing its rights to payment into a union fund. That was said to be different to the case at hand where the union ought not to be penalized for placing trust on Hydro's ability to draw accurate maps. With regard to the equitable consideration that other employees may have received overpayment, counsel for the union stressed the evidence did not indicate to what extent Hydro may have overpaid. Finally, we were asked to consider this case of a grievance regarding a violation of the collective agreements provisions for the payment of travel time in that the employees did not receive full compensation because the amounts already paid could only be considered complete if it included interest.

THE DECISION

- The union has made a very persuasive argument. For any individual employees in question who were working at the Bruce Nuclear Power Station, they traveled from their homes to the project since 1984 without receiving the benefit of a travel allowance. When Hydro realized its errors and paid the principal amounts owing to those individuals, it became obvious that substantial amounts of money were owing, indeed, over \$11,000 in some instances. Thus, it can be seen that over the six year period, those individual employees were deprived of the use of that money. Had this case come before us by way of a grievance alleging non-payment of that money, the union would have a very strong case for a claim for interest.
- However, the case before us involves a grievance filed after the amounts of money payable under the collective agreement had been paid. There is no dispute over those facts. Thus, in very simple terms, there was no breach of the collective agreement at the time that the grievances were filed. The union alleges in its argument that payment of the principal amounts does not compensate the individuals fully for the amount of the travel allowances because they were deprived of the use of the money and are thus entitled to the interest to make them "whole" under the collective agreement. This argument of the union derives from the principles in the cases cited above

which say that the purposes of an award of compensation are to make the employees whole in terms of their collective agreement.

- 12. However, every case in which a board of arbitration has awarded interest has been founded upon the initial finding that a breach of the collective agreement has occurred. The equitable jurisdiction to award interest arises out of the jurisdiction to make a remedial award. That equitable jurisdiction does not come to life unless and until a violation of the collective agreement has been found. On the facts at hand, we can find no violation of Article 11 in that at the time of the grievance, and indeed at the time of the hearing, all the monies payable under the wording of that section had been paid. Hence, there is no equitable jurisdiction remaining in us to award interest upon those principle amounts.
- Even if were are wrong about this conclusion, and we were to accept the union's argu-13. ment that we can say that the full amounts payable under the collective agreement had not been made, that would mean that we would have to examine our equitable jurisdiction to award interest and determine whether this was an appropriate case to do so. Out of respect for the union's position and counsel for the union's able argument, we feel that we should address this point as well. We agree that interest is a matter of compensation and not a matter of penalty. Hence, it should never be rewarded by way of a penalty nor should it ever be denied by way of a reward. However, if we had any equitable jurisdiction to award interest, we would not do so in this case for several reasons. First and foremost it is in the best interest of industrial relations to discourage litigation. The facts here disclose that an innocent error was made by the employer. As soon as that error was discovered, the employer set about to pay the principal amounts owing to the individual employees on a voluntary basis. If we were to award interest at this point there would appear to be no incentive upon employers who recognized under-payments to either disclose these to the union or to make voluntary payments. Further, it is hard for this Board to conceive of how an error of this nature could have continued for so long without any individual employees or the union becoming aware of the error. While we do not fault the union for this, we cannot ignore this as a factor. Thus, under all the circumstances of the case, if we had the jurisdiction to award interest, we would have to declined to do so.
- 14. Hence, for the reasons outlined above, the grievance is dismissed.

2201-91-R Association of Allied Health Professionals: Ontario, Applicant v. Perth District Health Unit, Respondent v. Canadian Union of Public Employees, Intervener

Bargaining Unit - Certification - Employee Reference - AAHP applying for bargaining unit of paramedical employees in July 1991 - Whether AAHP's certification application barred - CUPE already representing certain employees of employer - CUPE earlier making s.106(2) application concerning employees covered by AAHP's application - Employer and CUPE settling the s.106(2) application in October 1991 by agreeing to include certain employees in CUPE bargaining unit - Board declining to retroactively apply agreement - Board ruling that neither section 106(2) application, nor agreement between employer and CUPE can bar AAHP's application - Board also rejecting employer's argument concerning undue fragmentation - Certificate issuing

BEFORE: Janice Johnston, Vice-Chair, and Board Members J. A. Rundle and P. V. Grasso.

APPEARANCES: James Fyshe, Catherine Bowman, Lynn Keays, Janice Parsons and Jennifer Leaney for the applicant; John W. T. Judson, Margaret Szilassy and Randy Brown for the respondent; Helen O'Regan for the intervener.

DECISION OF THE BOARD; November 15, 1991

- 1. This is an application for certification.
- 2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the Labour Relations Act.
- 3. The parties met with a Labour Relations Officer on October 25, 1991 and subject to the matter outlined below agreed that:

all paramedical employees of the respondent in the County of Perth, save and except supervisors, persons above the rank of supervisor and persons employed in any bargaining unit for which any trade union held bargaining rights as of September 27, 1991.

CLARITY NOTE:

For the purposes of clarity, the term "paramedical" includes occupational therapists, speech therapists, speech pathologists, physiotherapists, therapeutic and administrative dietitians, registered and non-registered pathological technologists, radiological technologists (radiography), radiological technologists (nuclear medicine), registered and non-registered respiratory technologists, registered and non-registered EEG, ECG and opthamology technicians, registered and non-registered ultrasound technologists, glaucoma technicians, ear, nose and throat technicians, cardiovascular technicians, electro-encephalographists, electrical shock therapists, laboratory technicians, laboratory assistants, electronic technicians, psychometrists, pharmacists, pharmacy technicians, psychologists, remedial gymnasts, medical records librarians, social workers child care workers, nutritionists, dental health educators and bio-medical technicians.

The Board notes the agreement of the parties that "paramedical personnel" also includes psychometry technicians, chiropodists, prenatal instructors, audiologists, research assistants, dental assistants, perfusionists, clinical instructors, medical photographer technical assistants, entrostomol therapists, respiratory therapists hyperbaric controllers, hyperbaric attendants, health records administrators

constitute a unit of employees of the respondent appropriate for collective bargaining.

- 4. It is the position of the intervener (also referred to as "CUPE") and the respondent (also referred to as "Perth" or the "employer") that the applicant, the Association of Allied Health Professionals (also referred to as "AAHP") is barred from making the current application for certification.
- 5. The parties were able to agree to a number of facts without the necessity of the Board hearing evidence. On April 8, 1970 CUPE acquired bargaining rights for the following bargaining unit:

all employees of the respondent in Perth County employed in its Health Unit, save and except chief health inspector, persons above the rank of chief health inspector, and persons covered by a subsisting collective agreement between the respondent and the Nurses' Association Perth County Health Unit.

6. The current application for certification concerns persons employed as occupational therapists and physiotherapists. At the time the Board issued the certificate to CUPE there were no persons employed in this capacity by Perth. It was agreed that CUPE never had bargaining

rights for employees in these positions, subject to the dispute in this case. The collective agreement between CUPE and Perth expired on December 31, 1990. In the most recent negotiations and in prior negotiations CUPE has sought to include these employees in their bargaining unit. Up until the current negotiations this was resisted by Perth.

7. On July 8, 1991 CUPE filed an application pursuant to section 106(2) of the *Labour Relations Act* (the "Act") concerning the employees in question (Board File No. 1250-91-M). Letters dated October 24, 1991 by representatives of CUPE and Perth reflect an agreement between the parties. They read as follows:

October 24, 1991.

Mr. John W.T. Judson, Lerner & Associates, P.O. Box 2335, 80 Dufferin Avenue, LONDON, Ontario. N6A 4G4

Dear Mr. Judson: Re: C.U.P.E., Local 3308 & The Perth District Health Unit - O.L.R.B. File #1250-91-M & Intervention File #2201-91-R

Further to our recent conversations, I have been directed by C.U.P.E., Local 3308, to conclude this matter based on the following agreement.

The classification of Speech Pathologist, Physiotherapist, Occupational Therapist and the Non-Management Nutritionist, shall become members of the bargaining unit and further to this, that the classification of Aids Co-Ordinator, Health Educator, Management Nutritionist and Epidemiologist shall be excluded from the terms of the collective agreement and that the new collective agreement between the parties shall-be amended to reflect these changes.

May I please receive from you written confirmation of your agreement and with that we would be prepared to withdraw our request to the Ontario Labour Relations Board, under file number 1250-91-M

Awaiting your reply. I remain,

Yours truly,

"Roger D. Neeley",

Roger D. Neeley, Representative, CUPE

RDM/ed

cc: J. Anderson
G. LeBel
T.A. Inniss
B. Muller

October 24, 1991

File Number 77,541-5

Mr. Roger D. Neeley Representative Canadian Union of Public Employees Local 3308 826 King Street 2nd Floor London, Ontario N5W 2X5

Dear Sir:

Re: Perth District Health Unit and CUPE, Local 3308

Further to our recent discussions in this matter, and further to your letter of October 24, 1991, I wish to confirm that my client, Perth District Health Unit, agrees the above matter shall be resolved on the basis that the positions of Speech Therapist, Physiotherapist, Occupational Therapist and the non-management Nutritionist, shall be accepted as recognized in the CUPE bargaining unit. In turn, I confirm that CUPE has agreed that the positions of AIDS Educator, Health Educator and Epidemiologist are excluded from the CUPE bargaining unit.

I trust this resolves the matter.

Yours very truly

John W.T. Judson JWTJ/jb

cc: Ms. T. A. Inniss -File Number 1250-91-M

cc: Perth District Health Unit

- 8. The Perth District Health Unit provides public health service. It has three components: public health inspection; preventative health which includes education; and home care. A medical Director oversees the entire operation and the three functions operate out of one location (there are some branch offices as well).
- 9. The home care program is fully funded by the Province but administered by Perth. The public health functions are funded by a formula whereby the Province, the County of Perth and individual cities such as Stratford and St. Mary's, share the costs. In addition to the bargaining rights held by CUPE, bargaining rights are also held for nurses employed by Perth.
- 10. The employer and CUPE took the position that the agreement reached by them, documented in the letters dated October 24, 1991, was reached in the course of negotiations for the renewal of their collective agreement and acted as a bar to the current application by AAHP. The parties agreed that the section 106(2) application in and of itself was not a bar. It stands as evidence of CUPE's desire or position that the employees in question belong in their bargaining unit. Counsel for the respondent, characterized the agreement as one reached in the context of collective bargaining and by its nature retroactive to January 1, 1991. In support of his contention that the Board should uphold this agreement and find that it acts as a bar to the current application

counsel, referred the Board to *Brayshaws Steel Ltd.* 26 D.L.R. (3d) 153. As was candidly conceded by counsel, this case is readily distinguishable from the facts of the instant case. Given the very different factual context in the *Brayshaw Steel* case it is of limited assistance to the Board.

- 11. Counsel for the employer also raised the issue of fragmentation. Perth already has two bargaining units and counsel argued that to add a third would be an inappropriate further fragmentation of the employees into multiple bargaining units. In addition there appears to be some possibility that the employees employed in the home care program may be split off at some future date from the District Health Unit. As this event may or may not happen it is not necessary for the Board to consider the implications it may raise.
- 12. Counsel for the applicant argued that the application by CUPE pursuant to section 106(2) of the Act is irrelevant to these proceedings. Even if the Board had rendered a decision in that case it would merely have determined whether or not certain employees, employed in the disputed classifications, were employees for the purposes of the Act. It would not have resulted in the placement of these employees in the bargaining unit.
- Counsel for the applicant took the position that the agreement of the parties reflected in the letters dated October 24, 1991 did not act as a bar to this application for certification. He pointed to the wording in the letter which indicated that the various positions "shall become" members of the bargaining unit. It was his position that this wording implied a future intention and he questioned the assertion that this agreement had retroactive application. There were no words to that effect in the October correspondence and counsel argued that it would be a curious result for the Board to conclude that employees could be bound by a collective bargaining agreement imposed on them retroactively. The issue of fragmentation was also submitted to be not relevant at this stage of the proceedings as the appropriate bargaining unit had already been agreed to by the parties, subject to the resolution of the "bar" issues. Even if the issue of fragmentation were relevant, counsel argued that Perth has always treated the employees covered by this application as a separate group. They had never been part of the nurses or CUPE bargaining unit therefore counsel questioned where the prejudice was in continuing to treat them separately.
- 14. After having carefully reviewed the submissions of the parties the Board concludes that neither the section 106(2) application nor the agreement reached between CUPE and Perth can act as a bar to these proceedings.
- 15. The Board has reiterated on many occasions that in applications pursuant to section 106(2) of the Act, the Board does not determine whether the persons who are the subject matter of the application, are employed within the bargaining unit. The issue is whether or not they are "employees" within the meaning of the Act. A finding that an individual is an "employee" does not mean that that person belongs in a particular bargaining unit. That is a matter which can only be determined by a Board of arbitration (see re Miller et. al. and Algoma Steelworkers Credit Union Ltd. et. al., (1974) 6 O.R. (2d) 676 (Ont. Div. Ct.); Nelson Crushed Stone, [1980] OLRB Rep. Oct. 1500; Northern Telecom, [1983] OLRB Rep. Jan. 95). Therefore while CUPE by applying pursuant to section 106(2) may be expressing an interest in these employees, it is not applying for bargaining rights for them and the Board could not make this determination. An application pursuant to section 106(2) cannot therefore act as a bar to an application for certification.
- 16. The agreement between CUPE and Perth to include the positions in question, and their incumbents, in the bargaining unit is reflected in the two letters dated October 24, 1991. We accept counsel for the applicant's assertion that it is inappropriate to assign retroactive intent to these documents, which do not contain any stipulation that this was in fact the intention of the parties. In addition, counsel for the respondent argues that the agreement reflected in the letters was reached

in the course of the ongoing negotiations for the renewal of the collective agreement. There is nothing in these documents that supports this assertion and in fact the agreement appears to have been reached in the context of the section 106(2) application. In any event, the Board declines to retroactively apply the agreement reflected in the October 24 letters. The agreement does not therefore act as a bar to this application (we are not to be seen as deciding by the above that even if the agreement had been signed in the course of negotiations it could act as a bar to an otherwise timely application for certification).

- 17. The only remaining issue to be dealt with is the issue raised by the employer concerning undue fragmentation of the employees. The circumstances under which the employer has chosen to raise this concern are somewhat unusual. It appears, and this was not disputed by the respondent, that the parties agreed that if the Board finds that the application for certification by AAHP is not barred (by the section 106(2) application or the agreement between CUPE and Perth) then the bargaining unit set out in paragraph three of this decision is appropriate. The employer is not proposing an alternative bargaining unit pursuant to the application for certification by AAHP, it is suggesting that the employees in issue should be included in the CUPE unit. However CUPE has not filed an application for certification for these employees.
- 18. It is well established by the Board's jurisprudence that in reaching a determination as to the appropriate bargaining unit the Board will recognize the wishes of the employees affected by the application. In this case, by signing applications for membership in AAHP, the employees have indicated a preference to be represented by the applicant in their employment relations with the respondent.
- 19. Having regard to the above therefore the Board determines that the bargaining unit proposed by AAHP, set out in paragraph three of this decision constitutes a unit of employees of the respondent appropriate for collective bargaining.
- 20. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 15, 1991, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
- 21. A certificate will issue to the applicant.

1441-91-FC International Leather Goods Plastics and Novelty Workers' Union, Local 8, Applicant v. Root Chemical Company Inc., Respondent

First Contract Arbitration - Employer proposing that employment be deemed terminated where employees have been laid off for one calendar month - Obvious effect of proposal is to deny meaningful recall rights to seasonal employees who constitute majority of employees in bargaining unit - Employer position uncompromising and without reasonable justification - First contract arbitration directed

BEFORE: Robert D. Howe, Vice-Chair, and Board Members J. Lear and K. S. Davies.

APPEARANCES: David Matheson, Alfred Sartorelli, Roman Stoykewych, and Andrew McKenzie for the applicant; Robert Budd and Terry Reid for the respondent.

DECISION OF THE BOARD; November 29, 1991

1. In a decision dated November 8, 1991, the Board wrote as follows regarding this application under section 40a of the *Labour Relations Act*:

For reasons which will be provided at a later date, the Board, pursuant to section 40a of the *Labour Relations Act*, hereby directs the settlement of a first collective agreement between the applicant and the respondent by arbitration.

The purpose of this decision is to provide our reasons for issuing that direction. (For ease of exposition, the applicant and the respondent are also referred to as the "Union" and the "Company" in this decision).

- 2. This matter was initially scheduled to be heard on August 8, 9, 12, and 14, 1991. However, the first two of those four hearing days were adjourned on the joint request of the parties, in order to permit them to narrow the issues in dispute in the application. Thus, the hearing did not commence until August 12. The continuation of hearing scheduled for August 14 was adjourned at the request of the respondent, due to the unavailability of its General Manager, Terry Reid, who was Company counsel's advisor and the sole witness who testified in these proceedings. That adjournment request was not opposed by the Union. Since the September and October continuation dates offered by the Board were not useable by the parties due to prior commitments, the hearing resumed on November 1 and concluded on November 7.
- 3. Section 40a of the Act provides, in part, as follows:
 - 40a.-(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report on a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.
 - (2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,
 - (a) the refusal of the employer to recognize the bargaining authority of the trade union;
 - (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;

- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.
- 4. The Union initially relied upon both parts (b) and (c) of section 40a(2) in support of the application. However, through the aforementioned issue-narrowing discussions, the parties agreed as follows:
 - (1) bargaining has in fact broken down for no other reason than the positions taken by the parties;
 - (2) all of the allegations with respect to conduct in the pleadings are no longer relevant as pleadings qua conduct;
 - (3) the core issues were thoroughly canvassed in bargaining and, in particular, in sessions on June 6 and 13, 1991; and
 - (4) the only outstanding issue is the reasonableness of the employer's bargaining position.
- 5. By letter dated May 29, 1991, the Deputy Minister of Labour informed the parties that the Minister had decided not to appoint a conciliation board. It is clear from the foregoing agreement of the parties, and from the evidence adduced before the Board, that the process of collective bargaining has been unsuccessful. The issue remaining in dispute between the parties is whether the cause of that lack of success was "the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification", i.e., whether the case falls within the purview of section 40a(2)(b).
- 6. In commenting on the proper interpretation to be given to the word "reasonable" in that provision, the Board wrote as follows in *Formula Plastics*, [1987] OLRB Rep. May 702:
 - 24. But was the employer's position taken without reasonable justification? Much depends on our interpretation of "reasonable" in this regard. Obviously the employer in this matter did have reasons for taking this position in the sense that it hoped to achieve a contract provision of benefit to itself. However, in our view, "reasonable" must mean something more than simply a rational relationship between a bargaining position and a party's self-interest. This test is so minimal that it would make the relief provided by section 40a(2)(b) virtually inaccessible, a result which we find inconsistent with the remedial nature of this provision. Reviewing the section as a whole, and having regard to the Board's analysis in Nepean Roof Truss, supra, and Juvenile Detention Centre (Niagara), [1987] OLRB Rep. Jan. 66, we find it difficult to conclude that the legislation was designed to do no more than ensure that parties were looking after their own interests in a logical way.
 - 25. Rather, in our view, the word "reasonable" imports an objective element into our consideration of the respondent's justification for its position. It is not simply a matter of whether the justification is reasonable from the respondent's point of view, or even from the applicant's. The legislation draws us into an unavoidable assessment of whether a given proposal or position is reasonable in objective terms, a task which to some extent takes the Board into uncharted waters.
 - 26. This is so, in part, because reasonableness is a relative concept; what is reasonable depends largely, if not entirely, upon the context in which such an examination is to be made. In considering section 40a(2)(b), such a context will include both the general landscape of labour relations and the specific labour relationship between the parties. In many cases such an assessment will also require the weighing and balancing of the opposing interests of the parties which they seek to pursue by way of their negotiating positions.

- 27. Moreover, while the Board has had occasion to scrutinize negotiations in the past, notably in the course of determining bad faith bargaining complaints, the nature of our inquiry under section 40a is significantly different. The jurisprudence developed under section 15 reflects a conscious intention to avoid reviewing the fairness or reasonableness of negotiating proposals as an exercise in itself (see for example, *Canada Trustco*, [1984] OLRB Rep. Oct. 1356). Rather, the Board's interest on a section 15 inquiry centers on whether a manifestly unreasonable proposal indicates the presence of bad faith on the part of a party, or a failure to make every reasonable effort to make a collective agreement. To the extent that section 40a requires us to examine the intrinsic reasonableness of a negotiating position, it represents a departure from the jurisprudence which has evolved under section 15.
- 28. The variety and social authority of the competing interests involved, together with the complex dynamics of the collective bargaining process make this task a difficult one. It requires a delicate assessment of the many differing factors which may be operating in and upon a given labour relationship, an assessment which must be approached from a perspective closely attuned to the practices and climate of labour relations at any particular point in time. Indeed, it is fair to say that this is a provision which will require the Board to draw heavily on its own expertise in labour relations.

See also Grant Forest Products Corporation, [1991] OLRB Rep. July 848; Kraus Carpet Mills Limited, [1991] OLRB Rep. Jan. 50; Venture Industries Canada Ltd., [1990] OLRB Rep. Aug. 904; and Alma College, [1987] OLRB Rep. Dec. 1453.

- With those principles in mind, we now turn to the material facts of the instant case. The respondent manufactures and packages windshield anti-freeze and swimming pool chemicals. Its windshield anti-freeze work is largely concentrated in the period from September to January, while its pool chemicals work commences in late December, peaks in February or March, and then falls off very quickly. Although (in the words of Mr. Reid) the plant "essentially goes dead" from April to August, the Company generally retains four or five employees to have a "core of consistency". The seasonal nature of the Company's production requirements gives rise to substantial fluctuations in its personnel needs at different times of the year. During its windshield anti-freeze production season, and to a lesser extent during the pool chemical production season, that core group of four to six full-time employees is supplemented by ten to fifteen seasonal employees, who are hired in September or October and generally remain with the respondent for four or five months before a shortage of work resulting from the seasonal nature of the Company's operations necessitates their layoff. The Company's core group of employees is also augmented by personnel obtained from employment agencies (referred to in this decision as "agency personnel"). Agency personnel are used primarily during periods of peak demand, in order to attain the high production levels required to meet customers' "just in time" delivery requirements. However, they are also used to some extent during most other times of the year to supplement the respondent's workforce. Thus, on a typical day during its busy season, the respondent will have four to six "core" employees and ten to fifteen seasonal employees at work in the bargaining unit, and will also be utilizing three to twelve agency personnel.
- 8. On December 12, 1990, the Board (differently constituted) certified the Union as the bargaining agent of "all employees of Root Chemical Company Inc., in the Town of Vaughan, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." By letter dated January 4, 1991, the Union gave the Company written notice of its desire to bargain with a view to making a collective agreement. On February 6, 1991, it sent the respondent a copy of its proposal for a collective agreement. That proposal contained a number of provisions regarding seniority rights and job security, including a requirement that layoffs and recalls be governed by seniority (provided that the senior employee had the ability to perform the available work), and a provision under which laid off employees would retain their

seniority rights for eighteen months. Under the Union proposal, the laid off employee's seniority rights would be lost if the employee was recalled to work by registered letter mailed to the employee's last known address on the records of the Company and failed to notify the Company of acceptance of the recall within five days, or failed to return to work within ten working days of receipt of notice of recall (subject to waiver or extension in the event of a postal strike).

9. The Company tabled its proposal for a collective agreement at a bargaining session held on April 15, 1991. The following provisions formed part of that proposal:

ARTICLE 10 - SENIORITY

• • • •

10.04 Loss of Seniority and Employment Rights

An employee shall loose [sic] all service and seniority and shall be deemed to have terminated if he:

• • •

(b) has been laid off for one (1) calendar month:

. . .

- (h) fails upon being notified of a recall to signify his intention to return within three (3) calendar days after he has received a notice of recall and fails to report to work within seven (7) calendar days after he has received the notice of recall or such further period of time as may be agreed upon by the parties. It is the employee's responsibility to ensure that his home address and telephone number are current at all times. If the employee fails to do this, the Employer will not be responsible for failure to notify.
- On June 6, 1991, the Union revised its position on Article 10.04(b) to eight months which, although ten months less than its original position, would still afford seasonal employees recall rights for the next season. Despite that substantial reduction, the Company remained inflexible concerning the "one calendar month" period proposed by it. The Company's only movement in respect of Article 10.04(b) was an offer to add the following sentence after the words "has been laid off for one (1) calendar month": "However, if the employee is subsequently rehired within six (6) months of the date of termination in accordance with this provision, the employee will maintain the seniority standing the employee enjoyed as of the date of termination pursuant to this provision". (That offer was made by the Company on June 6, 1991, and was subsequently incorporated into the "proposed collective agreement that the respondent is prepared to execute" which, in accordance with the Board's Practice Note No. 18, forms part of the respondent's reply.)
- In seeking to justify the respondent's position regarding Article 10.04(b), Mr. Reid suggested that it would be too administratively burdensome for the Company to recall seasonal employees because "the entire front office only runs with three or four people, so our ability to manage our administrative function is fairly thin." He also told the Board that the Company's proposal was based on its past experience that only a few seasonal employees return to work for the Company the following year. However, he acknowledged in cross-examination that the Company has in its office a computer network that consists of "four big p.c.'s", and also acknowledged that the Company already has on file all of the information that would be needed to implement the recall system proposed by the Union. During his testimony before the Board, Mr. Reid further indicated that at times the Company has gone to considerable lengths to rehire some of its seasonal

employees; in attempting to counter the Union's suggestion that he views Company personnel as "disposable employees", he told the Board:

We need to have people in the plant who know the job in terms of productivity.... We go through a fair amount of trials and tribulations in September retraining, re-emphasizing how to run the equipment. So trained employees are of value to us. We had two [seasonal employees] come back this year. We went after them - chased them down to Trinidad and Tobago. Seasonal employees are of value to us, and very productive when they do the job right.

- Having duly considered all of the evidence, the able submissions of counsel, and the principles set forth in the Board's previous decisions regarding section 40a(2)(b), we are unanimously of the view that, in the instant case, the process of collective bargaining was unsuccessful because of the uncompromising nature of the bargaining position adopted by the respondent in respect of job security and recall rights, without reasonable justification, as exemplified by its position concerning Article 10.04(b). The insubstantial justification offered by the respondent falls far short of reasonably justifying the Company's uncompromising position regarding the one-month period specified in that provision, the obvious effect of which is to deny any meaningful recall rights to its seasonal employees, who from September to January or February constitute a majority of employees in the bargaining unit, and who will invariably be laid off for more than one month when the respondent's plant "goes dead" from April to August.
- The Board is not persuaded that sending recall notices by registered mail to the Company's seasonal employees from the previous year constitutes an undue administrative burden, particularly in the context of a business which has the benefit of a fairly sophisticated computer system. Moreover, the Company's purported reliance on past experience in this regard is also quite hollow, as the Company has never previously sent out recall notices to seasonal employees, and has no actual knowledge of how seasonal employees would respond to such notices where, by accepting recall, they would retain their seniority and other collective agreement rights. When considered in the context of the Company's other proposals (many of which seek to retain for management a largely unfettered discretion in respect of hiring, discharging, laying off, and recalling employees), the Company's position regarding Article 10.04(b) appears to us to reflect an inability or unwillingness on the part of the respondent to recognize that, as a result of the applicant's certification, it cannot reasonably expect to continue to operate its business in precisely the same manner as it has previously done, without regard for meaningful seniority rights and other elements of job security which have come to be among the hallmarks of successful collective bargaining.
- 14. In view of the conclusion that we have reached in respect of the respondent's position regarding Article 10.04(b), it is unnecessary to comment on the other Company proposals that were addressed in evidence and argument, apart from noting that our silence concerning those proposals is not to be construed as implicitly indicating that the Company had reasonable justification for all of them.
- 15. Thus, for the foregoing reasons, the Board directed the settlement of a first collective agreement between the applicant and the respondent by arbitration, pursuant to section 40a of the *Labour Relations Act*.

COURT PROCEEDINGS

1171-89-FC; 1545-89-R (Court File No. 1007/91) Knob Hill Farms Limited, Applicant v. The United Food & Commercial Workers Union, Local 206, The Crown in right of Ontario (Minister of Labour), the Ontario Labour Relations Board

First Contract Arbitration - Judicial Review - Termination - Employer initially refusing to meet to bargain, subsequently attempting to delay commencement of bargaining, and refusing to provide union with accurate collective bargaining information to which it was entitled - Employer engaging in surface bargaining - Employer positions with respect to management rights, wages, benefits and classifications uncompromising and without reasonable justification - First contract arbitration directed - Board dismissing termination application pursuant to section 40a(22) of the Act - Employer applying for judicial review on ground that the union had ceased to exist and, therefore, lacked the legal status to request conciliation (which was a statutory pre-condition for the Board's decision) - Employer also submitting that the Board committed jurisdictional error in its interpretation of s.40a(22) of the Act - Judicial review application dismissed by Divisional Court

Board decision reported at [1991] OLRB Rep. April 521.

Ontario Court of Justice, Divisional Court, O'Driscoll, Hartt and Rosenberg JJ., November 22, 1991.

ROSENBERG J. (Orally): This is an application for an order quashing and setting aside:

- i) the decision of the respondent, the Crown in Right of Ontario, the Minister of Labour, hereinafter the "Minister", dated November 17, 1988, to appoint a Conciliation Officer pursuant to the request made by the respondent, United Food and Commercial Workers Union, Local 206 ("Local 206"); and
- ii) the decision of the Minister not to appoint a Conciliation Board, dated July 28, 1989; and
- iii) the decision of the respondent, The Ontario Labour Relations Board, dated April 9, 1991.

The essence of the applicant's submissions with regard to the first two decisions was that Local 206 no longer existed and therefore the Minister could not, on the application of Local 206, make the orders complained of. Since this is an application for judicial review the court has the discretion in deciding whether or not to grant the relief sought. Accordingly, we have determined not to do so for the following reasons.

First, the applicant has had ample opportunity to challenge the existence of Local 206 and has not done so and is not now entitled to argue, as a collateral matter and as part of the attack on the Minister's orders, that Local 206 does not exist. In fact the applicant's earlier attack on the certification of Local 206 was dismissed by this court as then constituted.

Secondly, from a practical point of view, Local 206 and Local 175 have become one entity, and Local 175 can carry on and fulfil all of the obligations of Local 206.

The Ontario Labour Relations Board found on April 7, 1988, in the application of Local 175 and Viletta China Canada Limited that:

2. Having regard to the material before it, and pursuant to section 62 of the Act, the Board hereby declares that the applicant union has acquired the rights, privileges and duties of its predecessor The United Food & Commercial Workers International Union, Local Union 206, by reason of a merger, amalgamation, or transfer of jurisdiction.

The merger agreement provides in part as follows:

The successor local Union (UFCW Local 175) shall also assume all obligations of the merged Local Union of every kind and character, including collective bargaining obligations, and shall succeed to every and all rights and privileges of the merged Local Union as of and *subsequent to said date*.

[Emphasis added]

The last relief sought in the application is the setting aside the Board's decision on the grounds that the proceedings did not accord with the principles of natural justice. The thrust of the argument before us is that the Board having decided to hear both the application for compulsory arbitration and the termination application together, that they did not adequately explain their reasons for dismissing the termination application. It is acknowledged that only one of the applications could be allowed and the granting of either application automatically called for the dismissal of the other. The hearing of the two together is not challenged and the Board, quite properly, having determined from all of the evidence that the one application should be allowed gave adequate reasons for their dismissing the termination application. In any event, we are of the view that the applicant is attempting to assert the rights of third parties who have not chosen to participate in the application. In these circumstances the applicant employer lacks the standing to advance such an argument Canadian Labour Relations Board and Transair Ltd., [1977] 1 S.C.R. 722 at pp. 744-45, and American Barrick Resources Corp. v. United Steelworkers of America (1991), 2 O.R. (3d) 266 at 268.

In the result the application is dismissed.

O'DRISCOLL J. (ORALLY): I have endorsed the back of the record:

The application is dismissed for the oral reasons given for the court by Mr. Justice Rosenberg. The applicant to pay to the Union its costs before Mr. Justice Mandel and before the Divisional Court, after assessment thereof. The Board does not ask for costs. The applicant to pay to the Minister his disbursements, if demanded.

0595-86-R; 0596-86-U; 0828-86-R; 0829-86-U; 1399-86-R; 1400-86-U; 1898-86-R; 1899-86-U (Court of Appeal No. 541/90) Ontario Legal Aid Plan under the administration of The Law Society of Upper Canada, Appellant v. Ontario Public Service Employees Union, Ontario Labour Relations Board, Neighbourhood Legal Services, Injured Workers' Consultants, Tenant Hotline Inc. and Community Legal Education Ontario, Respondents v. The Attorney General for Ontario, Intervener

Judicial Review - Related Employer - Union seeking declaration that the Ontario Legal Aid Plan is a common employer with four community legal clinics - Clinics independent of OLAP but are funded by it and are accountable for the proper use of public funds - OLAP found to be engaged in related activities - Common control criteria met because OLAP influenced the management of the clinics - Board exercising discretion to make one employer declaration with respect to two clinics where OLAP had so involved itself in the affairs of the clinics that to ensure meaningful collective bargaining the union needed to be able to negotiate with OLAP - Court of Appeal holding that Board erred in refusing to consider the legal effect of the Regulation under the Legal Aid Act in making its determination - Court also finding Board's award patently unreasonable in creating, through its decision, an authority in the Law Society and the committee not conferred on them by the legislature - Court of Appeal quashing decision of the Board

Board decision reported at [1989] OLRB Rep. Aug. 862; Divisional Court decision reported at [1990] OLRB Rep. Jan. 118.

Court of Appeal, Brooke, Finlayson and Carthy JJ.A., November 18, 1991.

Finlayson J.A.: This is an appeal pursuant to leave granted by this court from the order of the Divisional Court dated January 15, 1990, wherein it dismissed an application brought by the Ontario Legal Aid Plan ("OLAP") under the *Judicial Review Procedure Act*, R.S.O. 1980, c.224, as amended, for an order quashing the majority decision of the Ontario Labour Relations Board (the "Board"), dated August 29, 1989.

By a majority decision, the Board granted two applications brought by the respondent union, Ontario Public Service Employees Union ("OPSEU"), for what is know as a single employer declaration under s.1(4) of the *Labour Relations Act*, R.S.O. 1980, c.228, as amended. The Board made a declaration that:

- (a) the Ontario Legal Aid Plan under the administration of The Law Society of Upper Canada and Neighbourhood Legal Services, a legal aid clinic, constitute a single employer for the purposes of the *Labour Relations Act* with respect to the bargaining unit employees at Neighbourhood Legal Services; and
- (b) the Ontario Legal Aid Plan under the administration of The Law Society of Upper Canada and Injured Workers' Consultants, a legal aid clinic, constitute a single employer for the purposes of the *Labour Relations Act* with respect to the bargaining unit employees at Injured Workers' Consultants.

The Board was charged with the responsibility under s.1(4) of the Labour Relations Act of determining if, in its opinion, OLAP was, by its activities, associated or related to the activities of the above-named clinics to such an extent that it could be found that the amalgam of associated or

related activities was under common control or direction. The Board found that three clinics were under the common direction or control of both OLAP and the respective boards of directors of the clinics and exercised its discretion with respect to the two above-named clinics by declaring that OLAP and the two clinics constituted a single employer with respect to the bargaining unit employees in the two clinics.

The first problem that occurred to the court, but apparently not to the parties in the proceedings below, was the status of OLAP in an application of this nature. The Ontario Legal Aid Plan is a statutory scheme administered by a Committee, of which more will be said later, but it is in no sense an entity, legal or otherwise, which falls within the purview of the Board. It is the name of a legislative scheme for the provision of legal aid on a broad front. It is authorized by the *Legal Aid Act*, R.S.O. 1980, c.234, as amended and Ontario Regulation 59/86, as amended to O.Reg. 699/87 (the "Regulation"). Section 1(1) of the Regulation states, "[Plan' means the legal aid plan as established and administered by the Law Society under the Act and this Regulation". Section 1(4) of the *Labour Relations Act* is referable to the activities or businesses of corporations, individuals, firms, syndicates or associations. Section 1(4) reads as follows:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

[Emphasis added.]

When the court pointed out that OLAP could hardly qualify as an entity within the provisions of this section, counsel for OPSEU stated that he was content to have The Law Society of Upper Canada (the "Law Society") substituted for OLAP as one of the objects of the declarations of the Board. He stated that the only reasons OLAP was named by the Board was because the appellant was named in the application to the Board and no objection had been taken to it. This late consideration of this fundamental issue indicated that insufficient consideration has been given to the nature of the legal aid plan, the responsibilities of those charged with administering it, and the relationship of the legal aid clinics to the administrators of the plan.

By s.2 of the *Legal Aid Act*, the Law Society is empowered to establish and administer a legal aid plan in accordance with the said *Act* and the regulations thereto. In point of fact, the main focus of the work of the Law Society, as such, is with respect to the provision of legal aid on a "fee for service" basis. This involves the provision of legal services by lawyer members of the Law Society for a fee determined in accordance with a legal aid tariff. Legal aid clinics are a distinct method of providing legal services to the poor and often include services which are not traditionally offered by the practising bar. In consequence, many members, indeed the majority, of the staff of these clinics are social workers and paralegal personnel.

These clinics are dealt with separately under Part III of the Regulation. From the perspective of the legal aid plan, they are the responsibility of the Clinic Funding Committee (the "Committee") which is composed of three members appointed by the Law Society and two appointed by the Attorney General (s.5(1)). The clinics are, by the Regulation, independent of the Committee and operate under the direction of community boards of directors. The Committee is, however, authorized to "fund" these clinics and "funding" is defined by s.4(2) as the payment of funds to a clinic "to enable the clinic to provide legal services or paralegal services, or both, including activities rea-

sonably designed to encourage access to such services or to further such services and services designed solely to promote the legal welfare of a community, on a basis other than fee for service". "Clinic" in turn is defined in s.4(1)(a) as "an independent community organization providing legal services or paralegal services or both on a basis other than fee for service". [Emphasis added.]

I have emphasized the word "independent" and the reference to "community" because they are important to an understanding of the role of the clinics. They are to be community-oriented and are to be independent of province-wide control. Mr. Justice Grange stressed these factors in his Report of the Commission on Clinical Funding, dated October 25, 1978, when he said at pp.10-11:

Section 147 of the Regulation makes provision for the funding of "independent community based clinical delivery systems" and I approve of the term "independent" because it recognizes that clinics are to be free from any governmental control and are to be allowed to run their affairs, in effect, like a private law firm (subject to their duty to account for public funds).

Section 6(1) of the Regulation sets out detailed and comprehensive functions that the Committee is to perform. It is not necessary to set them out verbatim. They empower the Committee to direct its staff in the administration of Part III, to establish policy and guidelines in respect of the funding of clinics, to review and make recommendations to the Director of Legal Aid in respect of applications for funding, to recommend terms and conditions of funding, to require clinics who have received funds to report to the Committee on the use to which the funds have been put, to hear appeals from initial funding decisions by its staff, to entertain references from its staff on any funding matter and to hear and resolve any other dispute between a clinic and the staff of the Committee that it considers appropriate to hear. It is further instructed to direct its staff in the planning and development of the clinics and in developing the resource and training facilities for the clinics. To this latter end, it is to consult with the clinics in the development of training programs and, where advisable, to recommend funds for training programs and generally to "perform any other action that, in the opinion of the Committee, is advisable for the efficient performance of its functions under this Part".

It is difficult to envisage a broader regulatory mandate for a body entrusted with the responsibility of advising on and monitoring the use of public funds. To the extent that the clinics depend on funds from the legal aid plan, it has supervisory powers over every aspect of the clinics' lives. Counsel for OPSEU conceded that the Committee exercises quasi-judicial functions when it stands in appeal or review from disputes between its staff and that of the clinics. Under s.8 of the Regulation, it sits in appeal from the decision of its staff to refuse or limit funding. The Committee, under s.8(1), may require a clinic applying for funding to supply it with extensive information, "in such form and detail as [it] may require", as to its organization, activities, methods of business, financial transactions and "other information the staff or the Committee may consider relevant."

Finally, s.6(3) provides:

- 6(3) The terms and conditions of funding that the Committee may recommend to the Director in respect of any clinic may include, but are not limited to, the following:
- 1. The clinic shall be under the direction of a community board of directors.
- 2. The clinic shall employ a solicitor in the work of the clinic.
- 3. The personnel of the clinic shall be trained to a standard approved by the Committee. [Emphasis added.]

It was inevitable that the argument would be made that the degree of influence that the Committee has over the operation of the clinics is antithetical to the concept of independence of the clinics.

Such a challenge was made by four unionized clinics, including the two that are the beneficiaries of the declaration in this appeal. They maintained that the Committee had no right to set conditions on funding with respect to personnel benefits dealing with matters of maternity leave, paternity leave, sick leave and statutory holidays. This challenge was rejected by the Divisional Court in an unreported decision, *Central Toronto Community Legal Clinic v. The Law Society of Upper Canada*, released August 27, 1986. McRae J., speaking for the court, stated at pp.1-2:

The main thrust of the argument of the applicants is, that the establishment of these conditions is an improper and unlawful interference with the independence of legal aid clinics as prescribed by the regulations to the [Act]. We are not persuaded by this argument.

. . .

In our view, section 150 [now s.6 of the Regulation] gives the committee broad powers to set guidelines for the spending of public money by legal aid clinics.

The conditions of the certificates complained of do not interfere with the independence of the clinic in rendering or delivering quality legal services to the community. The respondent committee did not exceed its mandate but merely performed its public duty to ensure accountability of public funds.

Judith Rundle, in her dissent from the Board's decision in this case, was properly concerned that the declarations granted would demand a level of involvement by the Committee in the ongoing operations of the clinics which would exceed that approved by the Divisional Court. She stated at para. 6 of her decision:

A clinic cannot be "an independent community organization" while at the same time being bound together with OLAP as "one employer for the purposes of the *Labour Relations Act*". If a clinic is "independent", it by definition is not under the "common direction and control" of another entity such as OLAP. While one recognizes that these two phrases are found in different pieces of legislation, they nonetheless have opposite or contradictory meanings. Therefore, given that these clinics have been found to be independent and eligible for funding, I do not see how the Board can conclude otherwise.

Having reviewed the objects and purposes of the legal aid plan, I have some difficulty with the concept that s.1(4) of the *Labour Relations Act* was intended to cover a situation such as this where the legal relationship was clearly designed to be one of a regulating Committee and a regulated clinic, or an administrator Committee and an administered clinic, not an employer Committee of the employees of the regulated clinics. The majority of the board seems to recognize that this is not an employer-employee relationship when the majority acknowledges in its reasons that the "control or direction" of the Committee over the clinics is financial and not managerial. The majority stated at para. 105 of its decision:

In the instant case, the three clinics receive almost all their revenue from OLAP. This, by itself, does not mean that OLAP and the clinics are under common direction or control. It does, however, mean that OLAP is in a position to influence the management and operations of the clinics.

Judith Rundle puts it this way at para. 17 of her dissent:

The majority however assert that OLAP's financial clout puts it "in a position to influence the management and operations of the clinic". I see nothing in s.1(4) which states that the Board may issue a single employer declaration whenever a party in a financially superior position is in a position of influence. If that were the case, every dominant client and every financial institution to which an employer is indebted would be subject to such a declaration. Section 1(4) was not intended to have such a broad sweep.

I agree with this observation. I appreciate that s.1(4) is intended to ensure that the Board can take into account labour relations reality without regard to legal form, and that, in a proper case, it is fully entitled to pierce the corporate or other legal veil to give recognition, for labour relations purposes, to what is in essence an employer-employee relationship. Where employers are closely related, it is often difficult to define the employment relationship. But the look behind the corporate or legal veil must reveal that there are sufficient indicia of the *managerial* control normally exercised by an employer over its employers to constitute a *de facto* employment relationship.

The fact that there is influence, be it financial or therwise, that can create a dependency by one entity upon another, may well be a factor in holding that a prima facie case has been made out for the common control and direction required by s.1(4) of the Labour Relations Act. However, this should not end the inquiry. In my opinion, it is necessary to look at the legal relationship which created this dependency before arriving at the conclusion that the common control and direction was of a managerial character. For instance, the fact that a bank has acquired such a dominance over a customer that it can dictate reductions in the customer's staff by the threat of calling its loan, does not convert, ipso facto, the bank from a lending institution to the de facto equivalent of an employer. In the case on appeal, it was not enough for the Board to look at the dominance of the Committee in the affairs of the clinics and to consider the effect of that dominance upon the bargaining rights of the employees, without going further and examining the provisions of the Legal Aid Act and the Regulation to see if that dominance was but a consequence of the relationship contemplated by the regulatory scheme. In other words, it was a mistake to look at the factual situation through labour relations eyes only, and that, as we shall see, is what the Board was doing.

In the cases cited to us as examples of where the Board had made single employer declarations, it is apparent that in those cases the *de jure* relationship created one impression, while the *de facto* relationship turned out to be an employment relationship. These were cases where management, whether it intended an anti-union animus or not, substituted some third party to do the work of its traditional work force. The effect of even *bona fide* business decisions, designed to provide the labour component for a commercial enterprise, was to undermine or frustrate the statutory rights of employees to the benefits of the collective bargaining process.

Thus, in *Brant Erecting and Hoisting*, [1980] O.L.R.B. Rep. July 945, Oct. 1353, the Board had no difficulty in dealing with the commercial reality involving a partnership called Brant Erecting and Hoisting that went out of business and was effectively replaced by a company called Beverly Munro Inc. carrying on business as Provincial Steel. Beverly Munro incorporated this company but it was run by her husband, William Munro. He was one of the former partners and the moving force in Brant. The Board made a declaration at p.950 that Brant and Provincial "are and always have been [one employer' for the purposes of the *Labour Relations Act*, and that Beverly Munro Inc. is bound by and must recognize any collective agreements or bargaining rights held by the applicant [union] in respect of Brant Erecting and Hoisting".

Similarly, in *Brantwood Manor Nursing Homes Ltd.*, [1986] O.L.R.B. Rep. Jan. 9, the Board considered arrangements whereby the operators of a nursing home had arranged for the performance by an outside agency (Hallmark Housekeeping Services) of housekeeping, laundry, maintenance and health care/nurse aide functions which had previously been performed by direct employees of the nursing home. The Board made a declaration that Brantwood Manor and Hallmark constituted one employer for the purposes of s.1(4) with respect to persons engaged by Hallmark to perform work at the nursing home.

A further example is *Penmarkay Foods Limited*, [1984] O.L.R.B. Rep. Sept. 1214, where a dispute arose out of the franchising of stores under the name of Mr. Grocer by Willett Foods, a cor-

porate relative of Dominion Stores. The stores were formerly owned by Dominion. Penmarkay was a franchisee from Willett Foods. The Board made a declaration that Dominion, Willett and Penmarkay were one employer in respect of the Mr. Grocer franchise.

Other examples were given, but what they all had in common was that the Board was dealing with bona fide employees who were doing a particular type of work, and the task of the Board was to find out who was, for labour relations purposes, their true employer. On the other hand, the Committee, under the Regulation, was never in the business of providing "labour" required to deliver legal services to the community on a basis other than fee for service. The clinics are not surrogate employers for the Law Society. The employees of the clinics are not performing tasks that were ever done, or were ever intended to be done, by employees of the Law Society.

With respect, I am of the view that the error that the majority of the Board fell into in this case was caused by its attempt to deal in a pragmatic way with a problem OPSEU perceived it had in its representation of the clinic employees at the bargaining table. The majority quoted OPSEU as contending that "its ability to bargain wages and benefits at the clinics is restricted by the level of funds they receive from OLAP". While acknowledging that the ability of many employers to agree to higher wages is conditioned by the level of their revenues, the majority did not accept this as a sufficient basis for a s.1(4) declaration and concluded at para. 107:

In our view, this case turns on the issue of whether OLAP has so involved itself in the affairs of the respondent clinics that to ensure meaningful collective bargaining the union should be able to negotiate with OLAP as well as the clinics.

It seems to me that the Board erred in not recognizing that OPSEU's "problem" was not management-oriented, but arose out of the role that the Committee was obligated to play in the administrative scheme propounded by the Regulation. The very control that OLAP was exercising over the clinics was that contemplated by the scheme of the legal aid plan contained in the *Legal Aid Act* and the Regulation. This control, and the validity of the authority for it, was recognized by the Divisional Court, *supra*, and was acknowledged by counsel for OPSEU and the Board on this appeal. The majority of the Board, however, were only concerned with a finding that OLAP had *de facto* control over the clinic employees, without concerning themselves with why this was so. The majority stated at para. 110 of its decision:

Our conclusion that OLAP and the clinics should be declared to be a single employer does not serve to inject OLAP into personnel and industrial relations matters at the clinics, but simply recognized that OLAP, in furtherance of its mandate, has already involved itself with such matters. We also note that a declaration by the Board applies only for the purposes of the Labour Relations Act and no other. [Emphasis added.]

Thus, it was argued before this court that the Board had simply recognized, for the purposes of its enabling statute only, that OLAP was acting *qua* employer to the employees of the individual clinics. However, the Board's disclaimer notwithstanding, it is apparent that the declaration that OLAP is a single employer along with the directors of the clinics brings about a fundamental change in OLAP's relationship with the clinics and, in particular, with the employees in that clinic. OLAP, or more properly the Committee, is charged with the responsibility of recommending to the provincial treasury the funding of these community clinics on an ongoing basis. It has the further responsibility of monitoring the activities of the clinics to ensure that the moneys so provided are properly expended and that a suitable standard of legal services is provided. This requires staff of the Committee, who are employees of the Law Society, to become closely involved in the day-to-day activities of the clinics. That they do so is evidenced by the findings of the Board, but it is an error to interpret this authorized intrusion into the clinic's affairs as constituting an employer-employee relationship.

As previously discussed, the Committee has very broad powers to verify a clinic's use of funds and can insist that the personnel of the clinics be trained to a standard approved by the Committee (subsections (3) and (4) of s.6), but to constitute the Committee as the functional and legal equivalent of the board of directors of the clinics is to destroy the arms' length relationship between the clinics and the Committee set up under the Regulation. Basic to the scheme of the Regulation is the concept that the clinics are supplicants of public funds. The Committee, composed of three members appointed by the Law Society and two by the the Attorney General for Ontario, is the agency of the government that passes on the merits of applications for funding and supervises the use to which the funds are put by the clinics. It has a supervisory and advisory role to play that is inconsistent and contradictory to the management functions performed by the boards of directors of the clinics.

The Board recognized that the wage levels that were available to employees of the clinics were "restricted by the level of funds that they received from OLAP" which in turn are received from the Ministry of the Attorney General. OLAP, through the Committee, simply recommends funding to the government. It would place the Committee in an intolerable conflict of interest if it were to agree at the bargaining table to a wage package with its "employer" hat on, and then have to advise the government in its "funding" capacity as to the merits of the clinic's application for moneys to cover the wages and employee benefits already agreed upon. In effect, the Committee is being asked to take to the collective bargaining table one of the major expenses of the clinics, the expenses of which it is the Committee's duty to monitor and control under the regulatory scheme. Instead of being able to stand back and assess the cost of services agreed upon by the management of the clinics and its employees, the Committee will be obliged to bargain in good faith with the clinic employees concerning these same costs.

The majority of the board appeared to be of the view that the declaration sought, being for labour relations purposes only, would not interfere with the functioning of the Committee or its relationship with the clinics. In response to the concern expressed by counsel for OLAP that a declaration that his client was a common employer with the boards of directors of the clinics "might result in a clinic no longer being independent as required by the [R]egulation", the majority stated at para. 110 of its decision:

This Board is not charged with the responsibility of interpreting and applying the clinic funding regulation. It is, however, charged with interpreting and applying the *Labour Relations Act*, a statute which governs employment relations at both Neighbourhood Legal Services and Injured Workers' Consultants.

In my opinion, the Board was wrong when it instructed itself that it "is not charged with the responsibility of interpreting and applying the clinic funding regulation". Had it so charged itself, the Board would have recognized that it was changing the legal character and function of the Committee with respect to the very matters that, by its declaration, it had made subject to the *Labour Relations Act*. Only the legislature can bring about such a change. By stipulating that the entire wage package of the employees of the individual clinics was to be part of the collective bargaining process, the Board is placing the Committee in the position where it will be forced to the bargaining table to negotiate with respect to matters that the Regulation gives to it alone to consider in making its recommendations to the government.

There was considerable discussion in our court as to the standard of review in cases such as this. We were referred at length to CAIMAW, Local 14 v. Paccar of Canada Ltd. (1989), 62 D.L.R. (4th) 437 (S.C.C.), Lester (W.W.) (1978) Ltd. v. U.A.J.A.P.P.I., Local 740, [1990] 3 S.C.R. 644, and National Corn Growers Association v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324. The submission made by counsel for OLAP was that the Supreme Court of Canada had expanded the

scope of judicial review of decisions of administrative tribunals. I do not think I have to get into this discussion, because even on the basis recently adopted by this court and accepted by all counsel as the least intrusive standard of review, I am of the opinion that the decision of the board cannot stand.

In Cadillac Fairview Corp. Ltd. and R.W.D.S.U. (1989), 71 O.R. (2d) 206 (C.A.), Robins J.A., speaking for the court with respect to a decision of the Ontario Labour Relations Board, stated at p.214:

If the Board has acted within the area of jurisdiction confided to it by the Act, the preclusive effect of the privative clause renders its decisions unreviewable even though it may have done something wrong within that area. On the other hand, if the Board has made an error which goes to its jurisdiction or has interpreted its powers in a patently unreasonable manner, the privative clause does not operate to oust the court's supervisory authority or to preclude judicial intervention.

Similarly, in Dayco (Canada) Ltd. and National Automobile, Aerospace & Agricultural Workers Union of Canada (1990), 74 O.R. (2d) 648 (C.A.), Blair J.A. stated at pp. 652-3:

The standard of review applicable to any administrative decision, including that of an arbitrator, depends on whether it is protected by a privative clause. If it is so protected and the arbitrator has acted within his jurisdiction, the award cannot be set aside unless it is patently unreasonable. The award is not required to be legally correct as it would be if not protected by a privative clause.

I come to the conclusion that the Board's decision cannot be supported. As is apparent from my reasons, there seem to be two ways to describe the error made by the Board in this case. These characterizations complement one another. First, the Board erred in deciding that it need have regard only to its own enabling statute in determining if there was an employment relationship between what is called OLAP and the staff of the clinics. The refusal, on the facts of this case, to examine the provisions of the *Legal Aid Act* and the Regulation and to acknowledge the legal relationship behind the apparent "employment relationship", means that the Board interpreted its own powers in a manner that was patently unreasonable.

The Board had a duty to consider the legislative bases of the Law Society and particularly the Committee in reaching its conclusion that O.L.A.P., under the administration of the Law Society, was a single employer under s.1(4) of the *Labour Relations Act*. Case law demonstrates that when faced with an interpretation or an application of a statute not squarely within its legislative mandate, a tribunal or board cannot abstain from applying or interpreting that statute. In *McLeod v*. *Egan*, [1974] 1 S.C.R. 517, Laskin C.J.C. made the following statement on review of a decision made by a labour arbitrator at pp. 518-19:

Although the issue before the arbitrator arose by virtue of a grievance under a collective agreement, it became necessary for him to go outside the collective agreement and to construe and apply a statute which was not a projection of the collective bargaining relations of the parties but a general public enactment of the superior provincial Legislature. On such a matter, there can be no policy of curial deference to the adjudication of an arbitrator, chosen by the parties or in accordance with their prescriptions, who interprets a document which is in language to which they have subscribed as a domestic charter to govern their relationship.

That is not to say that an arbitrator, in the course of his duty, should refrain from construing a statute which is involved in the issues that have been brought before him. In my opinion, he must construe, but at the risk of having his construction set aside by a Court as being wrong. [Emphasis added.]

Freedman J.A. of the Manitoba Court of Appeal also held in Parkhill Bedding and Furniture Ltd.

v. International Molders and Foundry Workers Union of North America, Local 174 (1961), 26 D.L.R. (2d) 589 that a board faced with the construction of another statute in the course of making a decision must do so. In referring to a case concerning an application for certification where the Board was required to determine whether policemen qualified as employees, Freedman J.A. stated at p.597:

In the case of the policemen, there is again a question of status which can only be determined by an examination of law outside the four corners of the *Trade Union Act. I do not say that the Board is not entitled to examine that law. Of course it must do so.* I say only that an error in that sphere will give the Court a right to quash the decision on *certiorari*. [Emphasis added.]

Thus, in refusing to consider the legal effect of the Regulation, passed under the authority of the Legal Aid Act, in making its determination, the Board, in my opinion, erred in the exercise of its authority to the point of making a patently unreasonable interpretation of its own duties under its enabling legislation.

Secondly, even if the Board did not have to consider the Regulation, its decision creates an extension of the powers and duties of the Law Society and the Committee beyond their statutory mandate and alters the legal effect of the relationship between the Committee and the clinics. The decision of the Board, in making O.L.A.P., under the administration of the Law Society, a single employer conferring on it the duty to bargain in good faith, created a fundamental change in its basic structure, a change not contemplated by the legislature. The Law Society's functions, and those of the Committee as set out in s.6(1) of the Regulation, relate to funding and supervising the operation of the clinics. Since a statutory creation cannot operate beyond its functions as set out in the legislation, and since nothing in the Regulation authorizes either the Law Society or the Committee to perform the functions of an employer *qua* the clinics, they cannot act in that capacity. In creating, through its decision, an authority in the Law Society and the Committee not conferred on them by the legislature, the Board made an award that is patently unreasonable.

Notably, this position that the Board's decision was patently unreasonable, both because of its refusal to take into account the statutory provisions and its ultimate disregard of their nature, was supported in this appeal by the Attorney General on behalf of the government. As counsel for the Attorney General pointed out, these single employer declarations by the Board have wide ramifications to a government that is heavily involved in the financing of other programs that require close monitoring to ensure that public funds are being properly used. The suggestion by counsel for OPSEU and the Board that these declarations are in no sense an enlargement of the powers that the Board has previously exercised in the private sector loses some of its credibility in the light of the position taken by the Attorney General.

Accordingly, I would allow the appeal from the order of the Divisional Court, set aside the said order and substitute an order quashing the decision of the Board in this matter. I would award costs here and below to the Law Society against OPSEU. The Attorney General supported the appellant in its intervention but I would not award costs in its favour. Counsel for the Board supported the jurisdiction of the Board to make the decision that it did but I am not prepared to award costs against the Board. The true *lis* in this matter was between OPSEU and the Law Society and/or the Committee.

Brooke J.A.: I agree.

Carthy J.A.: I agree.







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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING OCTOBER 1991

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2964-89-R: Labourers' International Union of North America, Local 183 (Applicant) v. Belmont Property Management Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

0321-90-R: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Bob Hendricksen Construction Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1160-90-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Hanover Care Centre (Respondent)

Unit: "all employees of the respondent in Hanover, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, and office and clerical staff" (15 employees in unit)

1585-90-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Amapor Holdings Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (19 employees in unit)

2156-90-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 713537 Ontario Inc. c.o.b. as H.T. Lawrence Excavating (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2178-90-R: Local 47 Sheet Metal Workers' International Association (Applicant) v. Rayproof Canada Limited (Respondent)

Unit: "all sheeters, sheeters' assistants and material handlers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all sheeters, sheeters' assistants and material handlers in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

2210-90-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Armour Window Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent, excluding the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen, and persons above the rank of non-working foremen" (2 employees in unit)

2426-90-R: Labourers' International Union of North America, Local 183 (Applicant) v. Metropolitan Toronto Condominium Corporation 915 (M.T.C.C. 915) Philmor Group Limited (Respondent)

Unit: "all employees of the Philmor Group Limited employed at 80-88 Charles Street East, in the Municipality of Metropolitan Toronto, save and except property manager, persons above the rank of property manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (4 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

3095-90-R: Everready Employees Union Local 16 (Applicant) v. Gaslight Enterprises Inc. (Respondent) v. Mr. Rick Parsales (Objectors)

Unit: "all employees of the employer at 2055 Long Lake Road and 485 Barrydowne Road, in the City of Sudbury, save and except foremen, persons above the rank of foreman, the bookkeeper, employees regularly employed for not more than 24 hours per week, and students employed during the school vacation period" (17 employees in unit)

3255-90-R: Hotels, Clubs, Restaurants and Taverns Employees Union Local 261 (Applicant) v. Relax Hotel and Resorts Ltd. (c.o.b. as Relax Plaza Hotel, Ottawa) (Respondent)

Unit: "all employees of the respondent in Ottawa, save and except assistant manager, persons above the rank of assistant manager, front office manager and the Maintenance/Operations Manager" (8 employees in unit) (Having regard to the agreement of the parties)

0952-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. WorMark Development Corporation and Springbrook Gardens Contracting Inc., Springbrook Gardens Contracting Inc. (Respondents)

Unit: "all construction labourers in the employ of WorMark Development Corporation and Springbrook Gardens Contracting Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1053-91-R: Canadian Union of Public Employees (Applicant) v. Caduceus Living Centres (Lindsay) Limited Partnership c.o.b. as Residence on William Street (Respondent)

Unit #1: "all employees of the respondent in the Town of Lindsay, save and except professional medical staff, registered nurses, office and clerical staff, supervisors and persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (8 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Unit #2: (see Bargaining Agents Certified Subsequent to a Post-Hearing Vote)

1153-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Residential Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (15 employees in unit)

1213-91-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Cambridge Leaseholds Limited c.o.b. Downtown Chatham Center (Respondent)

Unit #1: "all employees of Cambridge Leaseholds Limited c.o.b. Downtown Chatham Center in Chatham, save and except supervisors, persons above the rank of supervisor, office and clerical staff, parking attendants, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (7 employees in unit) (Having regard to the agreement of the parties)

Unit #2: "all employees of Cambridge Leaseholds Limited c.o.b. Downtown Chatham Center in Chatham, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff, parking attendants" (6 employees in unit) (Having regard to the agreement of the parties)

Unit #3: "all parking attendants employed by Cambridge Leaseholds Limited, c.o.b. Downtown Chatham Center, save and except supervisors and persons above the rank of supervisor" (6 employees in unit) (Having regard to the agreement of the parties)

1294-91-R: International Union of Bricklayers & Allied Craftsmen, Local 2, Ontario (Applicant) v. F.S.R. Construction Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Traflager, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman; and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the indus-

trial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1295-91-R: International Union of Bricklayers & Allied Craftsmen, Local 2, Ontario (Applicant) v. Lourimar Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Traflager, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman; and all construction labourers in the employ of the respondent in all sectors of the construction industry in Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1410-91-R: International Union of Bricklayers & Allied Craftsmen, Local 2, Ontario (Applicant) v. Tempo Construction (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Traflager, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman; and all construction labourers in the employ of the respondent in all sectors of the construction industry in Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1466-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Fanad Enterprises Limited (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1527-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 729084 Ontario Limited c.o.b. as Premiere Cable Construction (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (24 employees in unit)

1600-91-R: International Union of Bricklayers and Allied Craftsmen, Local 20, Oshawa (Applicant) v. Avo Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman' and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1628-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. J.C. Melo Masonry (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (21 employees in unit)

1639-91-R: Custom Concrete (Northern) Employees Association (C.C.N.E.A.) (Applicant) v. Sarjeant Co. Ltd. (Respondent)

Unit: "all employees of the respondent in its Custom Concrete (Northern) Division at 262 School Road, in the City of Timmins, save and except office manager, persons above the rank of office manager, shop foreman and block plant crew" (9 employees in unit)

1666-91-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Skaf's Food Warehouse (Respondent)

Unit: "all employees of the respondent employed at its warehouse in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (24 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

1675-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Lindo Lar Masonry Inc. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman; and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham,

excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1676-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. O.J. Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman; and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1703-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Sequest Construction Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman; and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1724-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Vila Verde Masonry (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman' (7 employees in unit)

1725-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Pinheiro Masonry (Respondent)

Unit: "all journeymen and apprentice bricklayers and all journeymen and apprentice stonemasons in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen and apprentice bricklayers and all journeymen and apprentice stonemasons and all construction labourers in the employ of the respondent in all sectors of the construction industry excluding the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that por-

tion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman' (3 employees in unit)

1742-91-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128 (Applicant) v. Quinte Machine & Steel Ltd. (Respondent)

Unit: "all boilermakers and boilermakers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all boilermakers and boilermakers' apprentices in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1764-91-R: International Union of Bricklayers and Allied Craftsmen, Local 20, Oshawa (Applicant) v. Starlight Masonry (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman; and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

1765-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Kolar Masonry Co. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1766-91-R: International Union of Bricklayers and Allied Craftsmen, Local 20, Oshawa (Applicant) v. Atlantico Masonry Co. Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that por-

tion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1773-91-R: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen - Local 12 (Applicant) v. Magton Masonry Inc. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the County of Wellington, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1796-91-R: Office and Professional Employee's International Union (Applicant) v. Patricia Centre for Children and Youth (Respondent)

Unit: "all employees of the respondent employed in the District of Kenora, save and except supervisors persons above the rank of supervisor, executive secretary, executive director, manager finance and administration, manager programs and services and students employed in a co-operative work study program or during the summer vacation period" (30 employees in unit)

1814-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. First Masonry (Respondent)

Unit #1: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman' (5 employees in unit)

Unit #2: 'all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman' (5 employees in unit)

1815-91-R: International Union of Bricklayers and Allied Craftsmen, Local 20, Oshawa (Applicant) v. Trustt Masonry (Respondent)

Unit: "all bricklayers and bricklayer's apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario save and except non-working foremen and persons above the rank of non-working foreman and all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commer-

cial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman; all construction labourers in the employ of Trustt Masonry in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

1816-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Dynamo Masonry Contracting Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1817-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. J. Martins Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1828-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Lunardon Construction Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1829-91-R: United Food and Commercial Workers' Union, Local 1000A (Applicant) v. Bavarian Meat Products Limited (Respondent)

Unit: "all employees of the respondent in the City of North Bay, save and except forepersons, persons above the rank of foreperson, head cashier, office and clerical staff, and outside salesperson(s)" (21 employees in unit) (Having regard to the agreement of the parties)

1830-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. B.M. Bricklayers (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1835-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Peran Contracting (1987) Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1846-91-R: United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of The United States and Canada, Local Union 527 (Applicant) v. Ken Acton Plumbing & Heating Inc. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all sectors of the construction industry in the County of Grey and the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (16 employees in unit)

1852-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Good Knight Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman; and all construction labourers in the employ of the respondent in all sectors of the construc-

tion industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1853-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Frank's Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1874-91-R: Service Employees Union Local 268 Affiliated with the A.F. of L., C.I.O. and C.L.C. (Applicant) v. VS Services Ltd. (Respondent)

Unit: "all employees of the respondent at Lakehead University in Thunder Bay, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period" (43 employees in unit) (Having regard to the agreement of the parties)

1876-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Franca Masonry (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman; and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1877-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Westdown Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman; and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham,

excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1884-91-R: United Garment Workers of America and it's Local 253 (Applicant) v. P. R. D. Sportswear (Respondent)

Unit: "all employees of the respondent in the regional Municipality of Metropolitan Toronto, save and except forepersons and persons above the rank of foreperson" (2 employees in unit)

1915-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. SIFE Construction Division of 825420 Ontario Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1916-91-R: Ironworkers District Council of Ontario (Applicant) v. Colossal Metal Industries Ltd. (Respondent)

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers' apprentices in the employ of the respondent in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (22 employees in unit)

1919-91-R: Canadian Brotherhood of Railway, Transport and General Workers (Applicant) v. Domco Food Services Limited (Respondent)

Unit: "all employees of the respondent in the District of Cochrane Sunday Lake area, save and except head chef, persons above the rank of head chef, office and clerical staff and commissary staff" (18 employees in unit)

1933-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Sunbeam Construction Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman; and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1934-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Santos Masonry (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Mun-

icipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foremen; and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1949-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Unidos Bricklayers & Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman; and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1982-91-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Provincial Services (Respondent)

Unit: "all electricians and electricians apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians apprentices in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1986-91-R: United Steelworkers of America (Applicant) v. Ideal Plumbing Group Inc. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than twenty four (24) hours per week and students employed during the school vacation period" (56 employees in unit) (Having regard to the agreement of the parties)

1987-91-R: International Union, United Plant Guard Workers of America (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: "all security guards in the employ of the respondent in the County of Kent, save and except guard inspectors, persons above the rank of guard inspector, office, clerical and sales staff and students employed during the school vacation period" (57 employees in unit) (Having regard to the agreement of the parties)

1997-91-R: Ontario Liquor Boards Employees' Union (Applicant) v. DFS Canada Ltd. (Respondent)

Unit #1: "all employees of the respondent in the City of Mississauga, save and except assistant supervisors, persons above the rank of assistant supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (30 employees in unit) (Having regard to the agreement of the parties)

Unit #2: "all employees of the respondent in the City of Mississauga, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except assistant supervisors, persons above the rank of assistant supervisor, office and clerical staff" (15 employees in unit) (Having regard to the agreement of the parties)

2003-91-R: United Steelworkers of America (Applicant) v. Sani-Mobile Ontario N.E. Inc. (Respondent)

Unit: "all employees of the respondent in and out of the City of Sudbury, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff" (11 employees in unit) (Having regard to the agreement of the parties)

2008-91-R: Laundry and Linen Drivers and Industrial Workers Union Teamsters Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs Warehousemen and Helpers of America (Applicant) v. Acan Windows Inc. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank supervisor, office, clerical and sales staff" (21 employees in unit) (Having regard to the agreement of the parties)

2013-91-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Structform International Limited Structural Group (Respondent)

Unit: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

2023-91-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Bob Hendricksen Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2026-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Wasero Construction (1991) Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2039-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. John Salvatori Construction (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2042-91-R: Teamsters Local Union No. 879 (Applicant) v. Laidlaw Waste Systems (Canada) Ltd. (Respondent)

Unit: "all employees of the respondent out of the Material Reclaiming Facility in Hamilton, save and except forepersons, persons above the rank of foreperson, office and sales staff" (5 employees in unit) (Having regard to the agreement of the parties)

2061-91-R: International Ladies' Garment Workers' Union (Applicant) v. Journey's End Corporation (Respondent)

Unit: "all employees of the respondent in the City of Cornwall, save and except assistant managers persons above the rank of assistant manager auditors employed for more than 24 hours per week and students employed during the school vacation period" (19 employees in unit) (Having regard to the agreement of the parties)

2075-91-R: Labourers' International Union of North America, Local 506 (Applicant) v. Allied Architectural Systems Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Mississauga, save and except foremen, persons above the rank of foreman, office, clerical and sales staff. clarity note. those persons performing drafting duties would be excluded as part of the office unit" (42 employees in unit) (Having regard to the agreement of the parties)

2089-91-R: Labourers' International Union of North America, Local 1059 (Applicant) v. George and Asmussen Limited (Respondent)

Unit: "all construction labourers, in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2106-91-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Centenary Hospital (Respondent)

Unit: "all security guards of the respondent in the Municipality of Metropolitan Toronto, regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor and students employed during the school vacation period" (14 employees in unit) (Having regard to the agreement of the parties)

2126-91-R: Ontario Secondary School Teachers' Federation (Applicant) v. 772868 Ontario Limited, c.o.b. as King Square Collegiate (Respondent)

Unit: "all teachers employed by the respondent in the Municipality of Metropolitan Toronto, save and except principal, those above the rank of principal, and all office, clerical and maintenance personnel" (12 employees in unit) (Having regard to the agreement of the parties)

2145-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Mill Masonry Ltd. (Respondent)

Unit #1: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foreman and persons above the rank of non-working foreman; all construction labourers in the employ of the respondent in all sectors of the construction industry the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of

Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen, and persons above the rank of non-working foremen" (12 employees in unit)

2173-91-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. 772431 Ontario Limited c.o.b. as Journey's End Suites, Whitby (Respondent)

Unit: "all employees of the respondent in the Regional Municipality of Durham, save and except supervisors, those above the rank of supervisor, office and clerical staff, night auditors and front desk staff" (27 employees in unit) (Having regard to the agreement of the parties)

2186-91-R: United Food and Commercial Workers International Union, Local 633 (Applicant) v. 855436 Ontario Limited c.o.b. as Loeb Princess Street (Respondent)

Unit: "all employees of the respondent employed in the meat department at 1225 Princess Street, Kingston, save and except Department Managers, persons above the rank of Department Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (7 employees in unit) (Having regard to the agreement of the parties)

2196-91-R: Can-Ar Transit Operators Association (Applicant) v. Can-Ar Transit Services Division of Tokmakjian Limited (Respondent)

Unit: "all employees of the respondent at its Can-Ar Line Run Service Division operating in and out of the Town of Lindsay, save and except supervisors, persons above the rank of supervisor, office and sales staff" (10 employees in unit)

2214-91-R: Ontario Public Service Employees Union (Applicant) v. Plummer Memorial Public Hospital (Respondent) v. Service Employees International Union, Local 268 (Intervener)

Unit: "all registered and non-registered laboratory technologists, registered and non-registered radiology technologists, registered and non-registered nuclear medical technologists, registered and non-registered ultra sound technologists, laboratory assistants, diener, registered cardiology technologists, cardiology assistants pharmacy assistants, therapy assistants and respiratory therapy assistants in the employ of the respondent in the City of Sault Ste. Marie, save and except supervisors, persons above the rank of supervisor, pharmacists, dieticians, physiotherapists, occupational therapists, respiratory therapists, chief technologists, charge technologists, physiologists, psychometrists, social workers, recreational therapists, clinical instructors, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period, and employees in the bargaining units for which any trade union held bargaining rights on October 1, 1991" (47 employees in unit) (Having regard to the agreement of the parties)

2223-91-R: Canadian Paperworkers Union (Applicant) v. W. Geneau Trucking Ltd. (Respondent)

Unit: "all employees of the respondent in Cornwall, save and except foremen, persons above the rank of foreman, office, clerical and sales staff" (8 employees in unit) (Having regard to the agreement of the parties)

2226-91-R: Canadian Union of Public Employees (Applicant) v. Southern Ontario Library Service (Respondent)

Unit: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except senior coordinators, persons above the rank of senior coordinator and persons for whom any trade union held bargaining rights as of October 1, 1991" (14 employees in unit) (Having regard to the agreement of the parties)

2236-91-R: Canadian Union of Public Employees (Applicant) v. Construction Safety Association of Ontario (Respondent)

Unit: "all employees of the respondent in the Province of Ontario save and except supervisors, persons above the rank of supervisor, budget coordinator, administrative coordinator, coordinator information resources group, administrative assistants, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (95 employees in unit) (Having regard to the agreement of the parties)

2267-91-R: Ontario Public Service Employees Union (Applicant) v. Trenton & District Association For Community Living (Respondent)

Unit #1: "all employees of the respondent in the City of Trenton, save and except supervisors, persons above the rank of supervisor, office and clerical employees, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period" (16 employees in unit) (Having regard to the agreement of the parties)

Unit #2: "all employees of the respondent in the City of Trenton, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (7 employees in unit) (Having regard to the agreement of the parties)

2275-91-R: Graphic Communications International Union, Local 590-C (Applicant) v. Detail Printing and Graphics Inc. (Respondent)

Unit: "all employees of the respondent in the City of North Bay, save and except non-working forepersons and persons above the rank of non-working foreperson, office and sales staff" (10 employees in unit) (Having regard to the agreement of the parties)

2280-91-R: Service Employees Union Local 268 Affiliated with the A.F.of L., C.I.O. and C.L.C. (Applicant) v. V.S. Services Ltd. (Respondent)

Unit: "all employees of the respondent at Lakehead University in the City of Thunder Bay regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (23 employees in unit) (Having regard to the agreement of the parties)

2283-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Delgados Bricklayers Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

3408-90-R: United Steelworkers Of America (Applicant) v. Inco Limited (Respondent)

Unit: "all office, clerical and technical employees of the respondent in its Ontario Division in the District of Sudbury, save and except supervisors and forepersons, persons above the rank of supervisor and foreperson, process forepersons, persons employed in the Employee Relations Department (other than audio-visual technician and technologist), persons employed in the Public Affairs Department, persons employed in the Data

Base Group of the Computer Services Department as data base analysts and programmer analysts and in the Applications Support Group of the Computer Services Department as systems analysts and programmer analysts, and in the Security Group of the Computer Services Department as security administrators, persons employed in Internal Audit, employed at the Copper Cliff Club, senior claims administrators, claims administrators, central incentive administrator, senior industrial evaluators, industrial evaluators engaged in the incentive administration, office services and cost analyst - CCCR, senior specialists, project monitors, records administrator - archivest, investigators, training co-ordinators, ground specialists, ground control specialist who are professional engineers, professional engineers within the meaning of the Labour Relations Act, engineers-in-training, projects engineers, process engineers, Mines Research Engineers, Planners I and II in the Mines Engineering Department who are professional engineers, geologists who are professional engineers, senior payroll analyst (staff payroll), administrative clerk (M&U), registered nurses, plant protection officers, secretary to the President, executive secretaries, senior secretaries, secretaries to the Managers, secretary to the Medical Director, accounting secretaries, secretary to the power and utilities superintendents, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and students employed in conjunction with a co-operative training program of a registered college or university" (825 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of persons listed as eligible	825
Number of persons who cast ballots	792
Number of ballots marked in favour of applicant	395
Number of ballots marked against applicant	304
Number of ballots segregated and not counted	20

0849-91-R: Ontario Secondary School Teachers' Federation (Applicant) v. Board of Education for the City of London (Respondent)

Unit: "all continuing education instructors employed by the respondent in London, save and except Administrators and Coordinators, persons above the rank of Administrator and Coordinator, persons in bargaining units for which any trade union held bargaining rights as of June 13, 1991" (118 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on list as originally prepared by employer	193
Number of persons who cast ballots	42
Number of ballots marked in favour of applicant	35
Number of ballots marked against applicant	7

1040-91-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Board of Education for the City of Hamilton (Respondent)

Unit: "all office, clerical and technical employees regularly employed for not more than 24 hours per week and students employed during the school vacation period employed by the respondent in the City of Hamilton, save and except supervisors and managers, persons above the rank of supervisor and manager, confidential secretaries, negotiations and salary clerk, employee records coordinator, collective bargaining analyst, senior employment officer, employment officer, affirmative action coordinator, wage and salary administrator, internal auditor, budget analyst, chief payroll clerk, assistant to the secretary of the Board, section leader minutes, persons in bargaining units for which any trade union held bargaining rights as of April 15, 1991 and students employed in cooperative education programs" (294 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on list as originally prepared by employer	294
Number of persons who cast ballots	40
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	17
Ballots segregated and not counted	3

1879-91-R: Ontario Public School Teachers' Federation (Applicant) v. The York Region Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its elementary panel in the Regional Municipality of York, save and except persons who when they are employed as substitutes for other teachers, are teachers as defined in the School Boards and Teachers Collective Negotiations Act and persons who, when they are employed as supply teachers for replacement of summer school teachers" (609 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on revised voters' list	420
Number of persons who cast ballots	131
Number of ballots, excluding segregated ballots, cast by persons whose names appear	r on
voters' list	123
Number of segregated ballots cast by persons whose names do not appear on voters'	list 8
Number of ballots marked in favour of applicant	108
Number of ballots marked against applicant	15
Ballots segregated and not counted	8

2000-91-R: Canadian Union of Public Employees (Applicant) v. Windsor Coalition for Development Health Care Association Regency park Nursing/Retirement Centre (Respondent) v. Christian Labour Association of Canada (Intervener)

Unit: "all employees of Windsor Coalition for Development Health Care Association employed at its Regency Park Lodge, Windsor, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (65 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on list as originally prepared by employer	72
Number of persons who cast ballots	59
Number of ballots marked in favour of applicant	36
Number of ballots marked in favour of intervener	23

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0833-91-R: Ontario Secondary School Teachers' Federation (Applicant) v. Board of Education for the City of Scarborough (Respondent)

Unit: "all adult basic learning instructors and English as a second language instructors employed by the respondent in the City of Scarborough, save and except lead instructors and supervisors, persons above the rank of lead instructor and supervisor and employees in bargaining units for which any trade union held bargaining rights as of June 12, 1991" (112 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on list as originally prepared by employer	186 81
Number of persons who cast ballots Number of ballots marked in favour of applicant	49
Number of ballots marked against applicant Ballots segregated and not counted	31

1053-91-R: Canadian Union of Public Employees (Applicant) v. Caduceus Living Centres (Lindsay) Limited Partnership c.o.b. as Residence on William Street (Respondent)

Unit #1: (see Bargaining Agents Certified Without Vote)

Unit #2: "all employees of the respondent in the Town of Lindsay regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical staff, registered nurses, office and clerical staff, supervisors and persons above the rank of supervisor" (17 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	17
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	2

Applications for Certification Dismissed Without Vote

3376-86-R: Labourers International Union of North America, Local 183 (Applicant) v. Divo Construction (Respondent)

2737-89-R: United Brotherhood Of Carpenters And Joiners of America, Local Union 27 (Applicant) v. Rutherford Contracting Services Ltd. (Respondent) v. Mike Kirschen (Objectors) (11 employees in unit)

3174-89-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Applicant) v. China Steel Limited (Respondent) v. Group of Employees (Objectors) (4 employees in unit)

1612-90-R: United Brotherhood of Carpenters and Joiners of America, Local 446 (Applicant) v. Penn-Co Construction Ltd. (Respondent) v. Christian Labour Association of Canada (Intervener) (59 employees in unit)

1247-91-R: Labourers' International Union of North America, Local 1059 (Applicant) v. 806519 Ontario Limited o/a Trigger Contracting (Respondent) (8 employees in unit)

1851-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Pombal Masonry Ltd. (Respondent) (8 employees in unit)

2077-91-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Nu-West Hardwood (Respondent) (3 employees in unit)

2231-91-R: Labourers' International Union Of North America, Ontario Provincial District Council (Applicant) v. B.E.S.T. Construction Company Limited (Respondent) (19 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

3022-89-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Dafoe Floor (London) Limited (Respondent) v. Local Union 598 of the Operative Plasterers' and Cement Masons International Association of the United States and Canada (Intervener)

Unit #1: "all employees of the respondent engaged in cement finishing and waterproofing in the ICI sector of the construction industry in the Province of Ontario and all employees engaged in cement finishing and waterproofing in all sectors of the construction industry, save and except the ICI sector, in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin" (12 employees in unit)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	10
Number of ballots marked in favour of applicant	0
Number of ballots marked in favour of intervener	9
Ballots segregated and not counted	1

2050-91-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. Hotel Inter-Continental Toronto (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (90 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on list as originally prepared by employer	160
Number of persons who cast ballots	110
Number of ballots, excluding segregated ballots, cast by persons whose names app	ear on
voters' list	105
Number of segregated ballots cast by persons whose names appear on voters' list	5
Number of ballots marked in favour of applicant	45
Number of ballots marked against applicant	60

1709-91-R: United Steelworkers of America (Applicant) v. Wiresmith Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Mississauga, save and except forepersons, persons above the rank of foreperson, office, sales and technical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (45 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on list as originally prepared by employer	54
Number of persons who cast ballots	47
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	36

Applications for Certification Withdrawn

- 0184-91-R: United Brotherhood of Carpenters and Joiners of America Local 93 (Applicant) v. Moffatt Construction Inc. (Respondent)
- 1500-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Eagle Bricklayers Ltd. (Respondent)
- 1526-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Premiere Cable Construction (Respondent)
- 1528-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Premiere Cable Construction (Respondent)
- 1529-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Premiere Cable Construction (Respondent)
- 1530-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Premiere Cable Construction (Respondent)
- 1555-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Vision Masonry (Respondent)
- 1556-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Jobral Masonry (Respondent)
- 1677-91-R: International Union of Operating Engineers, Local 793 (Applicant) v. Villeneuve Construction Co. Ltd. (Respondent)
- 1705-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. B.C. Construction Ltd. (Respondent)
- 1726-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. M.L. Bricklayers (Respondent)
- **1821-91-R:** Service Employees International Union Local 532 Affiliated with S.E.I.U., A.F.L.-C.I.O., C.L.C. (Applicant) v. Southrim Enterprises Ltd. C.O.B. as Wellington Lodge and Wellington Home (Respondent) v. United Food and Commercial Workers International Union, Local 175 (Intervener)
- 1901-91-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 759 (Applicant) v. Lakehead Ornamental Irowork Incorporated, 348254 Ontario Limited, Lakehead Ironworks Inc. (Respondents)

- 1964-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Solar Masonry (Respondent)
- 1965-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Jamor Masonry Ltd. (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener)
- 1968-91-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Resar Construction Inc. (Respondent)
- 2012-91-R: Operative Plasterer's and Cement Mason's International Association of the United States and Canada Local Union No: 124, Ottawa, Ontario (Applicant) v. 927893 Ontario Limited (Respondent)
- **2022-91-R:** International Union of Bricklayers and Allied Craftsmen, Local 8, Ontario (Applicant) v. Fidale Bros. Masonry Const. (Respondent)
- **2024-91-R:** International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Blue Sky Masonry Ltd. (Respondent)
- **2051-91-R:** Textile Processors, Service Trades, Health Care, Professional & Technical, Employees International Union, Local 351 (Applicant) v. Inter-Continental Hotels Corporation, c.o.b. as Hotel Inter-Continental Toronto (Respondent)
- 2068-91-R: Laundry & Linen Drivers & Industrial Workers Union Local 847, Affiliated with The International Brotherhood of Teamsters, Chauffeur, Warehousemen and Helpers of America (Applicant) v. Pacific National Leasing Corporation (Respondent)
- 2084-91-R: United Brotherhood of Carpenters & Joiners of America (Applicant) v. Beaver Materials Handling Copmany Ltd. (Respondent)
- 2088-91-R: Service Employees Union Local 268 affiliated with the A. F. of L., C.I.O. and C.L.C. (Applicant) v. Plummer Memorial Public Hospital (Respondent)
- 2150-91-R: Amalgamated Clothing and Textile Workers Union Toronto Joint Board (Applicant) v. Goody Canada Limited (Respondent)
- **2188-91-R:** International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Cousins Masonry Ltd. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

- 1172-91-FC: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Wendy's Restaurants of Canada Inc. Store #365 (Respondent) (Granted)
- 1996-91-FC: Labourers' International Union Of North America, Local 1059 (Applicant) v. Vandenburg Contracting (1982) Limited (Respondent) (Withdrawn)
- **2204-91-FC:** Graphic Communications International Union, Local 500M (Applicant) v. Economy Webb Printing Inc. (Respondent) (Granted)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

- **0250-89-R:** United Brotherhood Of Carpenters And Joiners Of America, Local Union 27 (Applicant) v. Canada Framing And 560742 Ontario Limited, North York Construction Ltd. (Respondents) (*Withdrawn*)
- 2402-90-R: Labourers' International Union of North America, Ontario Provincial District Council (Appli-

- cant) v. 713537 Ontario Inc. c.o.b. as H.T. Lawrence Excavating and 756298 Ontario Ltd. c.o.b. as Lawrence Construction (Respondents) (Dismissed)
- **2447-90-R:** A Council of Trade Unions acting as Representative and Agent of Teamsters, Local Union 230 and Labourers' International Union of North America, Local 183 (Applicants) v. Associated Contracting Inc., Associated Paving Company Ltd., Capobianco Management Limited (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener) (*Withdrawn*)
- 2874-90-R: International Union of Operating Engineers, Local 793 (Applicant) v. Division Construction Limited, and Division General Contractors Inc. (Respondents) (Withdrawn)
- 0029-91-R: Sudbury Mine, Mill and Smelter Workers Union, Local 598 of the Canadian Union of Mine, Mill and Smelter Workers (Applicant) v. Midas Muffler (Sudbury) (Respondent) (Granted)
- **0573-91-R:** International Union of Bricklayers & Allied Craftsmen, Local 2 (Applicant) v. Division Construction Limited and/or Division General Contractors Inc. and/or Alta Surety Company of Canada (Respondents) (Withdrawn)
- **0584-91-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Moffatt Construction Inc., Moffatt Construction (1990) Inc., Ottawa Valley Investments Limited (Respondents) (Withdrawn)
- **0637-91-R:** International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Alliance Electrical and Windsor Premium Services Inc. (Respondents) (*Granted*)
- 0706-91-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 71 (Applicant) v. Transalta Energy Systems Corporation, Andover Controls Canada Inc., and ACS Ottawa Inc. (Respondents) (Withdrawn)
- **1255-91-R:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Detect Fire Protection Inc. -and-, Nucon Electrical Contractors Inc. (Respondents) (*Granted*)
- **1401-91-R:** Labourers International Union of North America, Local 183 (Applicant) v. Toronto Structural Concrete Sevices Ltd., Co-Pol Construction Corp., Watercon Development Corporation, Watercon Development Corporation Phase II (Respondents) (*Granted*)
- **1543-91-R:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Conlangelo Carpentry Company Ltd. and 800965 Ontario Limited (Respondents) (*Withdrawn*)
- 1977-91-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Shelving Displays (1988) Ltd. and, Betco Products Inc. (Respondents) (Withdrawn)
- **2079-91-R:** Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Grandstone Masonry Inc. and, Vieni Construction Limited (Respondents) (*Granted*)
- **2083-91-R:** Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Woodland Masonry Ltd. and, Toronto Masonry (1986) Limited (Respondents) (*Granted*)
- **2125-91-R:** Labourers' International Union of North America Local 183 (Applicant) v. WorMark Development Corporation and, Springbrook Gardens Contracting Inc. and, National Homes (Respondents) (*Granted*)
- **2132-91-R:** Labourers' International Union of North America, Local 1059 (Applicant) v. Resar Construction Inc. and, Area Construction Inc. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

- **0250-89-R:** United Brotherhood Of Carpenters And Joiners Of America, Local Union 27 (Applicant) v. Canada Framing And 560742 Ontario Limited, North York Construction Ltd. (Respondents) (*Withdrawn*)
- **2402-90-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 713537 Ontario Inc. c.o.b. as H.T. Lawrence Excavating and 756298 Ontario Ltd. c.o.b. as Lawrence Construction (Respondents) (*Dismissed*)
- 2447-90-R: A Council of Trade Unions acting as Representative and Agent of Teamsters, Local Union 230 and Labourers' International Union of North America, Local 183 (Applicants) v. Associated Contracting Inc., Associated Paving Company Ltd., Capobianco Management Limited (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener) (Withdrawn)
- 2874-90-R: International Union of Operating Engineers, Local 793 (Applicant) v. Division Construction Limited, and Division General Contractors Inc. (Respondents) (Withdrawn)
- **0045-91-R:** Employees of Zehr's Food Market Plus (Previously Super Centre #805) 600 Murphy Road, Sarnia, Ontario, N7S 2X1 Members of U.F.C.W. 1000 A (Applicant) v. Zehr's Food Plus Market, Local 1000 A U.F.C.W. (Respondents) (*Withdrawn*)
- **0637-91-R:** International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Alliance Electrical and Windsor Premium Services Inc. (Respondents) (*Granted*)
- **0706-91-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 71 (Applicant) v. Transalta Energy Systems Corporation, Andover Controls Canada Inc., and ACS Ottawa Inc. (Respondents) (*Withdrawn*)
- 0952-91-R: Labourers' International Union of North America Local 183 (Applicant) v. WorMark Development Corporation and, Springbrook Gardens Contracting Inc. and, National Homes (Respondents) (Granted)
- 0990-91-R: Canadian Paperworkers Union Local 1144 (Applicant) v. Innova Envelope, Division of Abitibi-Price Inc. Innova Envelope, Division of Abitibi-Price Inc. Markham, Ontario (Respondents) v. Canadian Paperworkers Union, Local 301 (Intervener) (Withdrawn)
- 1255-91-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Detect Fire Protection Inc. -and-, Nucon Electrical Contractors Inc. (Respondents) (*Granted*)
- **1401-91-R:** Labourers International Union of North America, Local 183 (Applicant) v. Toronto Structural Concrete Sevices Ltd., Co-Pol Construction Corp., Watercon Development Corporation, Watercon Development Corporation Phase II (Respondents) (*Granted*)
- **1900-91-R:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 759 (Applicant) v. Lakehead Ornamental Ironwork Incorporated, 348254 Ontario Limited, Lakehead Ironworks Inc. (Respondents) (*Withdrawn*)
- 1978-91-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Shelving Displays (1988) Ltd. and, Betco Products Inc. (Respondents) (Withdrawn)
- **2079-91-R:** Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Grandstone Masonry Inc. and, Vieni Construction Limited (Respondents) (*Granted*)
- **2083-91-R:** Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Woodland Masonry Ltd. and, Toronto Masonry (1986) Limited (Respondents) (*Granted*)

2125-91-R: Labourers' International Union of North America Local 183 (Applicant) v. WorMark Development Corporation and, Springbrook Gardens Contracting Inc. and, National Homes (Respondents) (Granted)

2132-91-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Resar Construction Inc. and, Area Construction Inc. (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0504-91-R: Trudy Leyds (Applicant) v. Canadian Paperworkers Union and its Local 333, C.L.C (Respondent) Unit: "all office and clerical employees of FICG Inc. at its head office in Metropollitan Toronto, save and except supervisors, persons above the rank of supervisor, buyers, sales staff, secretary to the president, secretary to the vice-president finance, secretary to the vice-president planning and development, secretary to the vice-president marketing, secretary to the vice-president retail, secretary to the vice-president and corporate secretary, floating executive secreary to the president and/or vice-rpesidents, programmer, display and promotions co-ordinator, great value/merchandising co-ordinator, persons regularly employed for not more than 24 hours per week, and students employed on a co-operative program with a school, college or university" (33 employees in unit) (*Having regard to the agreement of the parties*) (*Dismissed*)

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	30
Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	25

1643-91-R: Gordon J. Henderson (Applicant) v. United Food & Commercial Workers Local 175 (Respondent)

Unit: "all employees of Fundral Financial Services Limited at hamilton, save and except managers, persons above the rank of manager, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (7 employees in unit) (Having regard to the agreement of the parties) (Granted)

Number of names of persons on revised voters' list Number of persons who cast ballots Number of ballots marked in favour of respondent	7 5 0
Number of ballots marked in favour of respondent Number of ballots marked against respondent	5

1684-91-R: Nicolae Mazare and a Group of Other Employees of National Armoured Limited (formerly National Armoured Inc.) (Applicant) v. Teamsters Local Union No. 419 Affiliated with the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America (Respondent)

Unit: "all persons employed by the company carrying on business as National Armounred Inc. in the Town of Vaughan, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (20 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	17
	17
Number of persons who cast ballots	17
Number of ballots marked in favour of respondent	2
	15
Number of ballots marked against respondent	

1691-91-R: Gail Melnyk and Catherine Martin (Applicant) v. Office and Professional Employees International Union, AFL-CIO-CLC, Local 343 (Respondent)

Unit: "all its office and clerical employees" (2 employees in unit) (Having regard to the agreement of the parties) (Granted)

Number of names of persons on list as originally prepared by employer	2
Number of persons who cast ballots	2
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2

1854-91-R: Stephen G. Campbell (Applicant) v. Hotel Employees and Restaurant Employees Union, Local 75 of the Hotel Employees Restaurant Employees Union International A.F.L. C.I.O C.I.C. (Respondent) (Withdrawn)

2098-91-R: Franco Dileo (Applicant) v. United Steelworkers of America Local Union 8059 (Respondent) v. Vaughan Metal Polishing Limited (Intervener) (*Dismissed*)

2113-91-R: Elizabeth McCullough and all staff Children's Castle Day Care Centre Ltd. (Applicant) v. Canadian Union of Public Employees Local 2204 (Respondent) (11 employees in unit) (*Dismissed*)

2134-91-R: Jerry Heffernan (Applicant) v. Canadian Paper Workers Union Local 1199 (Respondent) (Withdrawn)

2187-91-R: Robin Owen (Applicant) v. Teamsters Local Union 879 (Respondent) (1 employee in unit) (Dismissed)

2216-91-R: Jane Hueston (Applicant) v. Ontario Public Service Employees Union and its Local 405 (Respondent) v. Community Legal Services (Ottawa-Carleton) Inc. (Intervener) (4 employees in unit) (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3525-86-U: Carpenters And Allied Workers Local 27 United Brotherhood Of Carpenters And Joiners Of America (Applicant) v. Labourers International Union Of North America, Local 183, E. M. Carpenters (1982) Ltd. (Respondents) (Withdrawn)

2255-87-U: Carpenters And Allied Workers Local 27 United Brotherhood Of Carpenters And Joiners Of America (Applicant) v. Labourers International Union Of North America, Local 183, E. M. Carpenters (1982) Ltd. (Respondents) (Withdrawn)

2374-87-U: Carpenters And Allied Workers Local 27 United Brotherhood Of Carpenters And Joiners Of America (Applicant) v. Labourers International Union Of North America, Local 183, E. M. Carpenters (1982) Ltd., Oliviera Carpentry, Belmonte Carpentry Ltd., Lopes Carpentry, Camo Construction (Respondents) (Withdrawn)

2159-88-U: Carpenters And Allied Workers Local 27 United Brotherhood Of Carpenters And Joiners Of America (Applicant) v. Labourers International Union Of North America, Local 183 (Respondent) (Withdrawn)

1686-89-U: Windsor Printing Pressman And Assistants' Union, Local #274 (Applicant) v. Sumner Press Limited (Respondent) (Dismissed)

3130-89-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Dafoe Floor (London) Limited, Provincial Conference of Ontario of the Operative Plasters' and Cement Masons' International Association of the United States and Canada, Livio Balanzin and Tony Bento (Respondents) (Withdrawn)

0022-90-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Dafoe Floor (London) Limited, Provincial Conference of Ontario of the Operative Plasterers and Cement Masons International Association of The United States and Canada, Livio Balanzin and Tony Bento (Respondents) (Withdrawn)

0510-90-U: Labourers' International Union Of North America, Local 1059 (Applicant) v. Dafoe Floor (Lon-

- don) Limited, Provincial Conference of Ontario of the Operative Plasterer, and Cement Masons International Association Of The United States and Canada, Livio Balanzin, Tony Bento (Respondents) (Withdrawn)
- **1061-90-U:** United Food and Commercial Workers International Union, Local 175/633 (Applicant) v. Thrifty Canada Ltd. c.o.b. as Thrifty Car Rental (Respondent) (*Granted*)
- 1161-90-U: London And District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Hanover Care Centre (Respondent) (*Granted*)
- 1878-90-U: Arthur Varty (Applicant) v. United Brotherhood of Carpenters and Joiners of America and Local Union 38, United Brotherhood of Carpenters & Joiners of America and Local Union 18, Edward P. Ryan, Claude Cournoyer, Sigurd Lucassen, United Brotherhood of Carpenters and Joiners of America (Respondents) (Dismissed)
- 2352-90-U: Palakdhari Ram (Applicant) v. Hotel Employees: Restaurant Employees Union, Local 75 (Respondent) v. Cara Operations Limited (Intervener) (Dismissed)
- **2456-90-U:** Shirley Clark (Applicant) v. International Beverage Dispensers' & Bartenders' Union Local 280 (Respondent) (*Withdrawn*)
- **2600-90-U:** Arthur Varty (Applicant) v. United Brotherhood of Carpenters and Joiners of America, United Brotherhood of Carpenters and Joiners of America, Local 38 and/or their successor/s (Respondents) (*Dismissed*)
- **2734-90-U:** Labourers' International Union of North America, Local 1059 on its own behalf and on behalf of Dale Kramer, and Dale Kramer on his own behalf (Applicant) v. Local 598 of the Operative Plasterers and Cement Masons International Association of the United States and Canada (Respondent) (*Withdrawn*)
- **2754-90-U:** Local Union 47 Sheet Metal Workers' International Association (Applicant) v. Rayproof Canada Limited (Respondent) (*Dismissed*)
- **3012-90-U:** Canadian Union of Educational Workers, Local 2 (Applicant) v. Governing Council of the University of Toronto (Respondent) (Withdrawn)
- **3254-90-U:** Douglas Ribble (Applicant) v. United Food and Commercial Workers International Union Local 459 (Respondent) v. H. J. Heinz Company of Canada Ltd. (Intervener) (*Dismissed*)
- **3339-90-U:** Everette Chapelle (Applicant) v. Toronto Transit Commission (Wheeltrans Div.) (Respondent) (*Dismissed*)
- 3375-90-U: Michael Kiss (Applicant) v. United Electrical, Radio and Machine Workers of Canada (UE) and its Local 550 (Respondent) v. Camco Inc. (Intervener) (*Granted*)
- **3406-90-U:** Sudbury Mine, Mill and Smelter Workers Union, Local 598 of the Canadian Union of Mine, Mill and Smelter Workers (Applicant) v. Midas Muffler (Sudbury, Ontario) (Respondent) (*Dismissed*)
- **3428-90-U:** Canadian Paperworkers Union and its Local 1291 (Applicant) v. Domtar Inc. (Fine Paper Merchants Group) (Respondent) (Withdrawn)
- 0046-91-U: Members of U.F.C.W. Local 1000-A, employed at Supercenter (Applicant) v. United Food and Commercial Workers Union (Respondent) (Withdrawn)
- 0190-91-U: Erik Hansink (Applicant) v. General Motors of Canada Oshawa Truck Plant Management (Respondent) (Withdrawn)
- 0349-91-U: Kevin Flynn, Robert Peters, Tom Stark, Dan McLean (Complainants) v. Uniflo Sewer Services Inc., Bruce Allan Noble (Respondents) (Granted)

- 0366-91-U: Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Applicant) v. Inter-Continental Hotels Corporation, c.o.b. as Hotel Inter-Continental Toronto (Respondent) (Withdrawn)
- 0395-91-U: Algoma University College Staff Association (AUCSA) (Applicant) v. Algoma University College (Respondent) (Withdrawn)
- 0405-91-U: United Steelworkers Of America (Applicant) v. Community Lifecare Inc. C.O.B. As Community Nursing Home And Villa Fatima/Palais (Respondent) (Withdrawn)
- 0430-91-U: Gilles Martin (Applicant) v. Eastern Ontario Terrazo and Tile Co. Ltd. (Respondent) (Withdrawn)
- **0565-91-U:** Larry Brown, Dave Smalley (Applicants) v. The International Association of Machinists and Aerospace Workers Local Lodge No. 1927 (Respondent) (*Withdrawn*)
- 0622-91-U: Ontario Nurses' Association (Applicant) v. Carecor Health Services Inc., Baycrest Hospital, Centenary Hospital, Central Hospital, Clarke Institute of Psychiatry, Donwood Institute, Etobicoke General Hospital, Hillcrest Hospital, Humber Memorial Hospital, Lyndhurst Hospital, Mount Sinai Hospital, North York General Hospital, Northwestern General Hospital, Ontario Cancer Institute/Princess Margaret Hospital, Providence Villa and Hospital, Queen Elizabeth Hospital, Queensway General Hospital, Scarborough General Hospital, St. Joseph Health Centre, St. Michael's Hospital, Sunnybrook Medical Centre, Toronto East General and Orthopaedic Hospital, Toronto Western Hospital, Wellesley Hospital, West Park Hospital, Women's College Hospital, York-Finch General Hospital, Ontario Hospital Association, The Toronto Hospital (Respondents) (Dismissed)
- **0689-91-U:** International Brotherhood of Electrical Workers, Local Union 894 (Applicant) v. Carlo's Electric Limited, Carlo Forasier, Carlo's Electric Employees Association, Kevin Walker (Respondents) (*Withdrawn*)
- 0690-91-U: John Kray (Applicant) v. Labourers' International Union Of North America, Local 506 (Respondent) (Withdrawn)
- **0691-91-U:** John Kray (Applicant) v. United Brotherhood Of Carpenters And Joiners Of America Local 27 (Respondent) (*Withdrawn*)
- 0744-91-U: Christina Chambers (Applicant) v. CUPE Local 181 Executives and Bev MacKay, Ex-Vice-President of CUPE Local 181 (Respondent) v. Jeff Rose and, Linda Clancy (Interveners) (Withdrawn)
- 0786-91-U: Labourers' International Union Of North America, Local 183 (Applicant) v. Lisbon Paving Co. Limited (Respondent) (Withdrawn)
- 850-91-U: Raymond A. Durocher (Complainant) v. Local 444 CAW (Respondent) v. National Apprentice Committee (Intervener) (Withdrawn)
- 0924-91-U: Office and Professional Employees International Union, Local 343 (Applicant) v. Industrial Family (Hamilton) Credit Union Ltd. (Respondent) (Withdrawn)
- **0989-91-U:** Canadian Paperworkers Union Local 1144 (Applicant) v. Canadian Paperworkers Union Local 301 (Respondent) v. Innova Envelope, Division of Abitibi-Price Inc. (Intervener) (*Withdrawn*)
- 1002-91-U: Kim Wood (Applicant) v. S.E.I.U. Local 220 (Respondent) (Withdrawn)
- 1193-91-U: Graphic Communications International Union, Local N-1 (Complainant) v. Moore Corporation Limited (Respondent) (Withdrawn)
- 1204-91-U: Hotels, Clubs, Restaurants, Taverns, Employees' Union, Local 261 and, Andr 2i Plouffe (Applicants) v. Ottawa Congress Centre and, Daniel Malette (Respondents) (Withdrawn)

- 1206-91-U: Larry Duffy (Applicant) v. Christian Labour Association of Canada (Respondent) (Withdrawn)
- 1265-91-U: John Villemaire (Applicant) v. National Automobile Aerospace and Agriculture Implement Workers Union of Canada (CAW Canada) (Respondent) (Withdrawn)
- 1302-91-U: Ontario Public Service Employees Union (Applicant) v. Canadian Red Cross Society (Respondent) (Withdrawn)
- 1390-91-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Applicant) v. Able-Atlantic (1989) Ltd. (Respondent) (Withdrawn)
- **1439-91-U:** David A. Suttleworth (Complainant) v. Toronto Civic Employees Union, Local 43 (Respondent) (Withdrawn)
- **1464-91-U:** Abderrahmane Elfarse (Applicant) v. United Electrical Radio and Machine Workers of Canada (Respondent) v. Fisher & Ludlow (Intervener) (*Granted*)
- 1536-91-U: Henry Melnyk (Applicant) v. Teamsters Local Union 938 (Respondent) (Withdrawn)
- **1598-91-U:** Ontario Public Service Employees Union and its Local 455 (Applicant) v. Catundra Day Care Centre Inc. (Respondent) (*Withdrawn*)
- 1601-91-U: Cesare Calabro (Applicant) v. Jim Pattison Sign Co. (Respondent) (Withdrawn)
- **1641-91-U:** Hotels, Clubs, Restaurants, Taverns Employees Union Local 261 (Applicant) v. Ottawa Congress Centre (Respondent) (*Withdrawn*)
- **1646-91-U:** Stephane Verreault (Applicant) v. Weston Bakeries, Pino Iellimo, Michelle Royer (Respondents) (Withdrawn)
- 1650-91-U: Bruno Succi (Applicant) v. Don. W. Whitty (Respondent) (Withdrawn)
- 1665-91-U: Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Belmont Plastering Co. Ltd. (Respondent) (Withdrawn)
- **1699-91-U:** Hotel and Restaurant Employees and Bartenders Union, Local 604, AFL., CIO., CLC. (Applicant) v. 736207 Ontario Limited, carrying on business as Walsh's (Respondent) (*Withdrawn*)
- 1728-91-U: Labourers' International Union Of North America, Ontario Provincial District Council, Labourers' International Union Of North America, Local 607 (Applicants) v. M N T Builders Limited (Respondent) (Withdrawn)
- 1768-91-U: Hotel And Restaurant Employees And Bartenders' Union, Local 604, AFL, CIO, CLC (Applicant) v. Merlin's (Respondent) (Withdrawn)
- 1798-91-U: United Steelworkers Of America (Applicant) v. Bingo Press & Specialty Limited COB as Bazaar Novelty (Respondent) (Withdrawn)
- 1799-91-U: Ontario Public Service Employees Union (Complainant) v. Tillsonburg & District Assocaition for Community Living (Respondent) (Withdrawn)
- **1839-91-U:** Service Employees' Union, Local 210 (Applicant) v. County of Kent operating as Thamesview Lodge (Respondent) (*Withdrawn*)
- **1865-91-U:** Mordechai (Mike) Akerman (Applicant) v. Local #43 C.U.P.E. (Metropolitan Toronto Civic Employees Union) and, Municipality of Metropolitan Toronto (Metro Works Dept.) (Respondents) (*Dismissed*)

1878-90-U; 2600-90-U: Arthur Varty (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local No. 38 of the United Brotherhood of Carpenters & Joiners of America, and/or their successors, Local Union No. 18 of the United Brotherhood of Carpenters & Joiners of America, Edward P. Ryan (Board Member, 9th District), Claude Cournoyer (Representative) and Sigurd Lucassen (General President) (Respondents) (Dismissed)

1895-91-U: Canadian Union Of Public Employees and its Local 3565 (Applicant) v. Ajax Public Library (Respondent) (Withdrawn)

1921-91-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. 876661 Ontario Limited, c.o.b. as LOEB I.G.A. Sarnia (Respondent) (Withdrawn)

1939-91-U: Robert J. Wicks (Applicant) v. C.A.W. Canada Local 222 (Respondent) (Withdrawn)

1947-91-U: Homes For The Aged Maintenance Staff City Of Thunder Bay Ontario (Applicant) v. Service Employees Internation Union Local 268 Thunder Bay Ontario (Respondent) (Withdrawn)

1962-91-U: United Food And Commercial Workers International Union, Local 1000A (Applicant) v. Bavarian Meat Products Ltd. (Respondent) (Withdrawn)

2009-91-U: Leonard Kuiack (Applicant) v. International Union of Operating Engineers, Mr. Joe Kennedy, Business Agent (Respondents) (*Withdrawn*)

2044-91-U: Ottawa-Carleton Public Employees Union, Local 503 (Applicant) v. The Humane Society of Ottawa-Carleton, Bill Gowling (Respondents) (Withdrawn)

2076-91-U: Janet Barnes (Complainant) v. b. Ouderkirk and T. Roberts (Respondents) (Dismissed)

2117-91-U: Kermit Mitchell (Applicant) v. Ontario Hydro (Respondent) (Dismissed)

2122-91-U: (Sheldon) Andrew Smith (Applicant) v. Gordon Patterson (Respondent) (Dismissed)

2131-91-U: United Food and Commercial Workers International Union, United Food and Commercial Workers International Union, Local 1977 (Applicants) v. Loeb Iga Preston (Respondent) (Withdrawn)

2136-91-U: Peter Kroon (Applicant) v. Cable Tech, The International Brotherhood of Electrical Workers Local 1590 (Respondents) (Dismissed)

2140-91-U: John Rybczynski (Applicant) v. Cornelius Manufacturing (Respondent) (Dismissed)

2149-91-U: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88 (Applicant) v. Easton's 28 Restaurants Ltd. c.o.b. Swiss Chalet Restaurant (Respondent) (Withdrawn)

2211-91-U: Labourers' International Union Of North America, Local 183 (Applicant) v. Karwald Industries Limited (Respondent) (Withdrawn)

2252-91-U: The Ontario Secondary School Teachers' Federation (Applicant) v. King Square Collegiate, a division of 772868 Ontario Limited and, Richard Fung (Respondents) (Withdrawn)

2276-91-U: Mark Herrington (Applicant) v. Jim Lynd, Fred Binder (Respondents) (Withdrawn)

2279-91-U: Ontario Public Service Employees Union And Its Local 541 (Applicant) v. The Donwood Institute (Respondent) (*Dismissed*)

2309-91-U: Frank C. Tracy (Applicant) v. S.A. Armstrong Ltd. (Respondent) (Dismissed)

2324-91-U: (Sheldon) Andrew Smith (Applicant) v. John Done (Health and Safety Manager Clarke Transport) (Respondent) (Dismissed)

2325-91-U: (Sheldon) Andrew Smith (Applicant) v. Mr. Gordon Patterson, Manager, Clarke Transport (Respondent) (Dismissed)

2372-91-U: International Union Of Operating Engineers, Local 796 (Applicant) v. Medigas Inc. (Respondent) (Withdrawn)

2397-91-U: United Steelworkers of America (Complainant) v. Valspar Inc. (Respondent) (Withdrawn)

2424-91-U: Hotel and Restaurant Employees and Bartenders Union, Local 604 (Applicant) v. Montreal House (Respondent) (Dismissed)

FINANCIAL STATEMENT

1754-90-M: Graham Smith, Allen Ouellette & Charles Wilburn (Applicant) v. Fred Marr, Financial Secretary, Treasurer, Business Manager, Local 700, International Association of Bridge, Structural and Ornamental Ironworkers (Respondent) (*Dismissed*)

3460-90-M: Clifford John Sanderson (Applicant) v. United Steelworkers of America, Local 2251 (Respondent) (Withdrawn)

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1264-91-M: The Metropolitan General Hospital (Applicant) v. International Brotherhood of Electrical Workers, Local 636 (Respondent) (Withdrawn)

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3032-89-OH: Deborah Brown (Complainant) v. Trelford Automobile Limited, Robet Trelford (Respondents) (*Granted*)

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0385-91-OH: Tom Parten (Complainant) v. TCG Materials Limited (Respondent) (Withdrawn)

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1271-90-G: International Union Of Operating Engineers, Local 793 (Applicant) v. Pumpcrete Rental Corporation (Respondent) (*Granted*)

1737-90-G: International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. Division Construction Limited (Respondent) (Withdrawn)

3215-90-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Canon Interiors Contracting (Respondent) (*Withdrawn*)

3313-90-G: Carpenters And Allied Workers Local 27 United Brotherhood Of Carpenters And Joiners Of America (Applicant) v. Colangelo Carpentry Company Ltd. (Respondent) (Withdrawn)

0253-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Toronto Structural Concrete Services (Respondent) (*Granted*)

0571-91-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Canal Contractors (a division of Canadian Shipbuilding and Engineering Ltd.) (Respondent) (*Granted*)

0702-91-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Margven (M+S) Roofing Ltd. (Respondent) (Granted)

0729-91-G: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Alliance Electric and Windsor Premium Services Inc. (Respondents) (*Granted*)

0759-91-G: A Council of Trade Unions, acting and representative and agent of Teamsters Local Union 230 and Labourers' International Union of North America, Local 183 (Applicant) v. Associated Contracting Inc. (Respondent) (*Withdrawn*)

0761-91-G: A Council of Trade Unions, acting and representative and agent of Teamsters Local Union 230 and Labourers' International Union of North America, Local 183 (Applicant) v. Associated Contracting Inc., Associated Paving Company Ltd., Capobianco Management Limited (Respondents) (Withdrawn)

1199-91-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Canadian Store Fixtures Inc. (Respondent) (*Granted*)

1254-91-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Detect Fire Protection Inc., Nucon Electrical Contractors Inc. (Respondents) (*Granted*)

1405-91-G: Sheet Metal Workers' International Association Local Union 47 (Applicant) v. Albion Refrigeration and Temperature Control Inc. (Respondent) (*Granted*)

1459-91-G: International Union of Operating Engineers and its Local 793 (Applicant) v. Pentzien Canada Inc. (Respondent) (*Withdrawn*)

1476-91-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, on its own behalf and on behalf of its Local Union 463 (Applicant) v. Electrical Power Systems Construction Association, -and- Ontario Hydro (Respondents) (Withdrawn)

- **1546-91-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Read Air Mechanical Services Ltd. (Respondent) (Withdrawn)
- **1585-91-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Eastown Electric Co. Ltd. (Respondent) (*Granted*)
- **1589-91-G:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Canwell Electric Limited (Respondent) (*Granted*)
- **1610-91-G:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. New Vision Renovations (Respondent) (*Granted*)
- **1668-91-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Eastown Electric Co. Ltd. (Respondent) (*Granted*)
- **1688-91-G:** Ontario Sheet Metal Workers' Conference and Sheet Metal Workers' International Association, Local 269 (Applicant) v. Robert Laframboise Mechanical Ltd. (Respondent) (*Withdrawn*)
- 1712-91-G: Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 124 (Applicant) v. Cardon Enr. (Respondent) (*Granted*)
- 1733-91-G: International Union of Bricklayers and Allied Craftsmen, Local 8 (Applicant) v. Novo Mundo Construction Ltd. (Respondent) (*Granted*)
- 1734-91-G: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Novo Mundo Construction Ltd. (Respondent) (Granted)
- 1749-91-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Cardon Enr. (Respndent) (*Granted*)
- 1778-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Rise Excavating & Sodding (Respondent) (*Granted*)
- 1793-91-G: Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Belmont Plastering Co. Ltd. (Respondent) (Withdrawn)
- **1822-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. P. R. Zeppieri Excavating & Grading Ltd. (Respondent) (*Granted*)
- **1823-91-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Resource Construction Ltd. (Respondent) (*Withdrawn*)
- **1824-91-G:** Labourers' International Union of North America, Local 506 (Applicant) v. Eastern Construction Company Limited (Respondent) (*Withdrawn*)
- 1840-91-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Amberland Electric (Respondent) (Dismissed)
- **1856-91-G:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. P.A. Richens Carpentry (Respondent) (*Granted*)
- **1859-91-G:** Labourers' International Union of North America, Local 837 (Applicant) v. Felea Contracting Co. Ltd. (Respondent) (*Granted*)
- **1863-91-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Applicant) v. Kawneer Company Canada Limited (Respondent) (*Granted*)

- **1866-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Anpro Excavating Contractors Ltd. (Respondent) (*Granted*)
- **1887-91-G:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Patent Scaffolding Co. Canada Inc. (Respondent) (*Granted*)
- **1905-91-G:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 759 (Applicant) v. Lakehead Ornamental Ironwork Inc. (Respondent) (*Granted*)
- **1906-91-G:** Labourers' International Union of North America, Local 1059 (Applicant) v. Bot Construction Limited (Respondent) (*Withdrawn*)
- 1908-91-G: Christian Labour Association of Canada (Applicant) v. Stephens & Rankin Inc. (Respondent) (Withdrawn)
- 1913-91-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 759 (Applicant) v. EKT 90 Inc. (Respondent) (Withdrawn)
- 1945-91-G: The International Brotherhood of Painters and Allied Trades and The Ontario Council of the International Brotherhood of Painters and Allied Trades Local 1494 (Applicant) v. Apex Painters & Contractors Inc. (Respondent) (Withdrawn)
- 1951-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Colosimo Contracting Ltd. (Respondent) (*Granted*)
- 1956-91-G: International Brotherhood of Painters & Allied Trades, Local 200 (Applicant) v. Peinture Brisson Enrg. (Respondent) (*Granted*)
- 1963-91-G; 2312-91-G: Sheet Metal Workers' International Association Local 47 (Applicant) v. Forced Air Comfort Limited (Respondent) (*Granted*)
- 1966-91-G: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Rock Construction & Management Ltd. (Respondent) (*Granted*)
- 1974-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Bay Forming Inc. (Respondent) (Withdrawn)
- 1975-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Bay Concrete & Drain Inc. (Respondent) (Withdrawn)
- **2001-91-G:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen Local 12 (Applicant) v. Novo Mundo Construction Ltd. (Respondent) (*Granted*)
- **2021-91-G:** Carpenters & Allied Workers, Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. P.C.L. Constructor Eastern Inc. (Respondent) (*Withdrawn*)
- **2040-91-G:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128 (Applicant) v. Electrical Power Systems Construction Association, and Delsan Demolition Ltd. (Respondents) (*Withdrawn*)
- **2046-91-G:** United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. McKay-Cocker Construction Limited (Respondent) (*Withdrawn*)
- **2066-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Livingston Construction Inc., Livingston Excavating & Trucking Inc. (Respondents) (*Granted*)

- **2074-91-G:** Labourers' International Union of North America, Local 837 (Applicant) v. C. P. Lafontaine Excavating Ltd. (Respondent) (*Granted*)
- 2078-91-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Grandstone Masonry Inc. and Vieni Construction Limited (Respondents) (Granted)
- **2082-91-G:** Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Woodland Masonry Ltd. and, Toronto Masonry (1986) Limited (Respondents) (*Granted*)
- **2091-91-G:** Sheet Metal Workers' International Association, Local 235 (Applicant) v. The Parent Company (Respondent) (*Granted*)
- **2095-91-G:** Labourers' International Union of North America, Local 506 (Applicant) v. Mississauga Cement Forming Ltd. (Respondent) (*Granted*)
- **2096-91-G:** Labourers' International Union of North America, Local 506 (Applicant) v. Dineen Construction Limited (Respondent) (*Withdrawn*)
- 2099-91-G: Labourers' International Union of North America, Local 506 (Applicant) v. James Kemp Construction Limited (Respondent) (Withdrawn)
- **2101-91-G:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Switchway Electric (Respondent) (*Granted*)
- **2103-91-G:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Tiger Enterprises Inc. (Respondent) (*Granted*)
- **2108-91-G:** International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. W.G. Gallagher Construction Limited (Respondent) (*Granted*)
- 2120-91-G: International Brotherhood of Painters and Allied Trades District Council 46 (Applicant) v. Seaway Painting Inc. (Respondent) (Withdrawn)
- **2121-91-G:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Servelo Carpentry Ltd. (Respondent) (*Granted*)
- 2133-91-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Area Construction Inc. and, Resar Construction Inc. (Respondents) (Withdrawn)
- **2148-91-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, on its own behalf and on behalf of its Local Union 463 (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondent) (*Withdrawn*)
- 2158-91-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Foster Wheeler Limited (Respondent) (Withdrawn)
- 2171-91-G: Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Malvin Drywall Ltd. (Respondent) (Withdrawn)
- **2172-91-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, on its own behalf and on behalf of its Local Union 463 (Applicant) v. Electrical Power Systems Construction Association, and Ontario Hydro (Respondents) (*Withdrawn*)
- **2191-91-G:** International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Downsview Drywall Lathing and Acoustical Drywall Systems (Respondent) (*Granted*)

- 2195-91-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 721 (Applicant) v. Giffin International Ltd. (Respondent) (Withdrawn)
- **2197-91-G:** International Union of Operating Engineers and its Local 793 (Applicant) v. Robert B. Somerville Co. Limited (Respondent) (*Withdrawn*)
- 2199-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ottawa Crane Rental Services Limited (Respondent) (Withdrawn)
- 2203-91-G: United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council (Applicant) v. Tilly Lake Construction Ltd. (Respondent) (*Granted*)
- 2209-91-G: Labourers' International Union of North America, Local 625 (Applicant) v. C & W Asphalt Paving Company of Wallaceburg Ltd. (Respondent) (Granted)
- 2219-91-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, on its own behalf and on behalf of its Local Union 463 (Applicant) v. Electrical Power Systems Construction Association -and-, Howden Group Canada Limited (Respondents) (Withdrawn)
- 2229-91-G: The International Union of Bricklayers & Allied Craftsmen, Local #1 (Applicant) v. Stradiotto Masonry (Respondent) (Granted)
- 2245-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. McKay-Cocker Construction Ltd. (Respondent) (Withdrawn)
- 2253-91-G: International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondent) (Withdrawn)
- **2263-91-G:** International Brotherhood of Painters & Allied Trades Local 1795 Glaziers (Applicant) v. St. Catharines Glass & Mirror (Respondent) (*Granted*)
- 2264-91-G: International Brotherhood of Painters and Allied Trades District Council 46 (Applicant) v. Associated Painting Limited (Respondent) (Withdrawn)
- 2272-91-G: Labourers International Union of North America Local 506 (Applicant) v. Novo Mundo Construction Ltd. (Respondent) (*Granted*)
- **2284-91-G:** International Union of Operating Engineers and its Local 793 (Applicant) v. Rental Excavating Ltd. (Respondent) (*Granted*)
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- 2315-91-G: Labourers' International Union of North America Local 1089 (Applicant) v. Doug Chalmers Construction Ltd. (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local Union 1256 (Intervener) (*Granted*)
- 2317-91-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Landmark Steel Ltd. (Respondent) (Withdrawn)
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- 2354-91-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Littlewood Hesse Architects Ltd. (Respondent) (Withdrawn)

2365-91-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Shewfelt & Dezainde Construction Ltd. (Respondent) (Withdrawn)

2417-91-G: IBEW Construction Council of Ontario and Local Union 1687 and Tim Butler and Paul Belair (Applicant) v. Corbett Electric Limited (Respondent) (*Granted*)

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3032-89-OH: Deborah Brown (Applicant) v. Trelford Automobile Limited, Robert Trelford, et al (Respondents) (*Granted*)

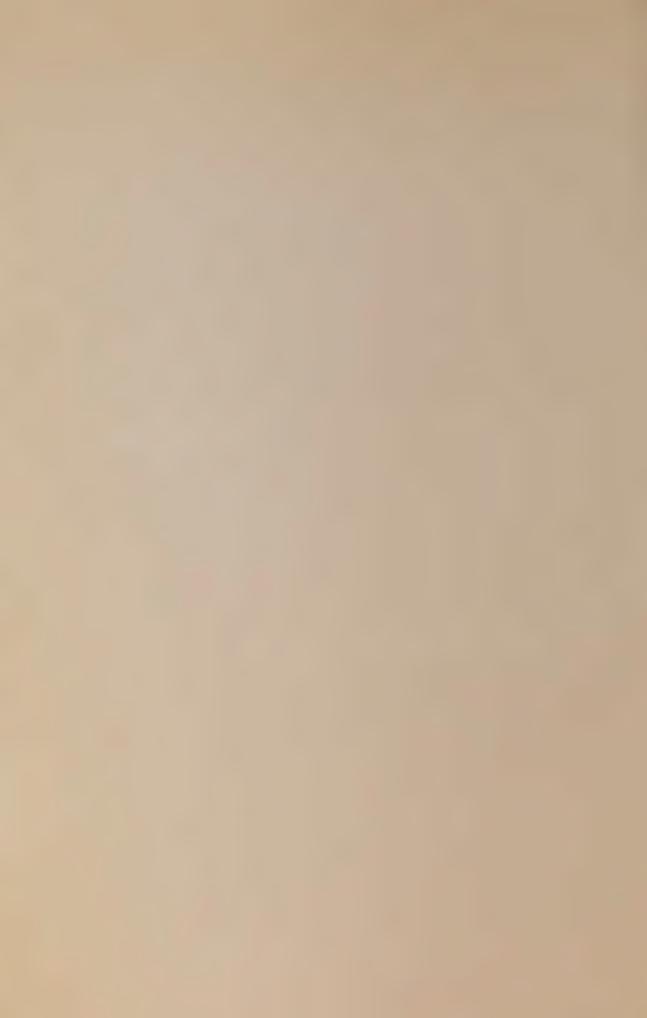
1597-91-R: Labourers' International Union of North America, Local 607 (Applicant) v. MNT Builders Limited (Respondent) (*Dismissed*)

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Ontario Labour Relations Board, 400 University Avenue, Toronto, Ontario M7A 1V4



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ONTARIO LABOUR RELATIONS BOARD REPORTS



December 1991



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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the Ontario Labour Relations Board

Cited [1991] OLRB REP. DECEMBER



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Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.



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VOLKSWAGEN CANADA INC.; RE C.A.W.; RE GROUP OF EMPLOYEES

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TRI-COUNTY CONTRACTING AND 666017 ONTARIO LIMITED, L-K INTERIOR CONTRACTING LTD., 754762 ONTARIO INC. A.K.A.; RE C.J.A., LOCAL 785.......

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GRAVEL AND LAKE SERVICES LIMITED AND THE ONTARIO LABOUR RELA-TIONS BOARD; RE I.W.A., LOCAL 2693.....

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GRAVEL AND LAKE SERVICES LIMITED AND THE ONTARIO LABOUR RELATIONS BOARD; RE I.W.A., LOCAL 2693.....

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GRAVEL AND LAKE SERVICES LIMITED AND THE ONTARIO LABOUR RELATIONS BOARD; RE I.W.A., LOCAL 2693	1442
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VOLKSWAGEN CANADA INC.; RE C.A.W.; RE GROUP OF EMPLOYEES	1423
Practice and Procedure - Adjournment - Evidence - Witness - Counsel objecting to question asked of witness in cross-examination - Board ruling that question may be put to witness -	

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STRATHROY NURSING HOME LTD.; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220 S.E.I.U., A.F.L., C.I.O., C.L.C.; RE GROUP OF EMPLOYEES.....

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GRAVEL AND LAKE SERVICES LIMITED AND THE ONTARIO LABOUR RELA-TIONS BOARD; RE I.W.A., LOCAL 2693.....

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Practice and Procedure - Certification - Evidence - Petition - Witness - Witnesses discussing evidence with others despite Board order excluding witnesses - Board finding witnesses' testimony so weakened that its probative value negligible - Board not conclusively determining non-pay allegation - Board satisfied that Form 9 declarant conducted thorough enquiry and that Form 9 reliable - Even if non-pay allegation sustained, Board would do no more than discount cards collected by particular collector - Union would still be left in certifiable position - Board finding petition not voluntary expression of true wishes of employees signatory - Certificate issuing

VOLKSWAGEN CANADA INC.; RE C.A.W.; RE GROUP OF EMPLOYEES

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Practice and Procedure - Construction Industry - Construction Industry Grievance - Damages - Evidence - Related Employer - Remedies - Sale of a Business - Unfair Labour Practice - Board declining to hear witness called in reply on ground that the evidence ought to have been part of the respondent's case in chief - Board finding respondents engaging in related activities under common control or direction - Respondents asking Board to decline to issue related employer declaration because of union's delay - Board applying KNK Limited case and granting declaration sought from the date the respondents became one employer - Damages in related employer application not awarded - Sale of a business application dismissed - Grievance partially upheld and damages awarded - Unfair labour practice complaint partially upheld

TRI-COUNTY CONTRACTING AND 666017 ONTARIO LIMITED, L-K INTERIOR CONTRACTING LTD., 754762 ONTARIO INC. A.K.A.; RE C.J.A., LOCAL 785.......

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Practice and Procedure - Construction Industry - Jurisdictional Dispute - Unfair Labour Practice - Board dismissing unfair labour practice complaint for failing to disclose a <i>prima facie</i> case - Board satisfied that Administrator of Plan for Settlement of Jurisdictional Disputes made clear decision and Board, therefore, assuming jurisdiction under section 91(14) of the <i>Act</i> - Board deferring complaint under section 91(1) until Board's decision under section 91(14) has issued	
ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; ONTARIO HYDRO; B.B.F., B.B.F., LOCAL 128; RE B.S.O.I.W., B.S.O.I.W., LOCAL 736	1347
Practice and Procedure - Construction Industry - Strike - Unfair Labour Practice - Employer bargaining agency alleging various unfair labour practices and seeking Direction regarding an unlawful strike - Board finding complainants without status to make allegations regarding sections 70 and 78 of the <i>Act</i> , and that no <i>prima facie</i> case made out with respect to other allegations - Board indicating that it would have deferred the complaints to the arbitration process in any event - Complaints dismissed	
I.B.E.W., LOCAL 353, JOE FASHION, BOB GILL & BILL MARTINDALE AND OTHERS; RE THE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO AND THE ELECTRICAL CONTRACTORS ASSOCIATION OF TORONTO	1362
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KOHUT, JOHN; RE C.A.W. AND ITS LOCAL 303; RE GENERAL MOTORS OF CANADA LIMITED	1367
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Remedies - Construction Industry - Construction Industry Grievance - Damages - Evidence - Practice and Procedure - Related Employer - Sale of a Business - Unfair Labour Practice - Board declining to hear witness called in reply on ground that the evidence ought to have been part of the respondent's case in chief - Board finding respondents engaging in related activities under common control or direction - Respondents asking Board to decline to issue related employer declaration because of union's delay - Board applying KNK Limited case and granting declaration sought from the date the respondents became one employer - Damages in related employer application not awarded - Sale of a business application dismissed - Grievance partially upheld and damages awarded - Unfair labour practice complaint partially upheld

TRI-COUNTY CONTRACTING AND 666017 ONTARIO LIMITED, L-K INTERIOR CONTRACTING LTD., 754762 ONTARIO INC. A.K.A.; RE C.J.A., LOCAL 785.......

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Remedies - Construction Industry - Construction Industry Grievance - Damages - In 1988 decision, Board allowing discharged employee's grievance and remaining seized with respect to compensation - Grievor's counsel requesting that Board reconvene to determine amount of compensation owing - Board noting that only the union and employer have standing on a section 124 application (subject to possible exceptions not relevant in this case) - Board dismissing grievor's request

ELLIS DON LIMITED; RE C.J.A., LOCAL 27

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TRI-COUNTY CONTRACTING AND 666017 ONTARIO LIMITED, L-K INTERIOR CONTRACTING LTD., 754762 ONTARIO INC. A.K.A.; RE C.J.A., LOCAL 785.......

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Strike - Bargaining Unit - Collective Agreement - Duty to Bargain in Good Faith - Evidence - Final Offer Vote - Judicial Review - Natural Justice - Practice and Procedure - Unfair Labour Practice - Voter eligibility in final offer vote limited in circumstances to persons who were employees in bargaining unit at time strike began, except where connection to workplace severed prior to date of vote - Injured employee with no expectation of returning to bargaining unit not eligible to vote - Good faith bargaining obligation not requiring employer to discuss new information with trade union prior to requesting final offer vote - Board not exercising discretion to grant unlawful strike declaration - Trade union refusal to execute collective agreement constituting breach of duty to bargain in good faith - Board directing union to execute collective agreement reflecting final offer accepted in vote - Union applying for judicial review on ground that Board had no jurisdiction to determine voter eligibility in a final offer vote - Union also submitting that Board breached rules of natural justice when it limited union's right to cross-examine and when it found a breach of the duty to bargain in the context of an unlawful strike application - Judicial review application dismissed by Divisional Court

GRAVEL AND LAKE SERVICES LIMITED AND THE ONTARIO LABOUR RELATIONS BOARD; RE I.W.A., LOCAL 2693.....

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1278-91-R; **1557-91-R** Labourers' International Union of North America, Local 183, Applicant v. **554538 Ontario Limited**, Respondent; International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario, Applicant v. 554538 Ontario Limited, Respondent

Certification - Construction Industry - Labourers making certification application for unit of bricklayers and construction labourers in all sectors - Bricklayers making certification application for overlapping but not congruent bargaining units - Whether Board should defer consideration of Bricklayers' application or deal with both applications together - Bricklayers given opportunity to amend bargaining unit to correspond to unit sought by Labourers - If Bricklayers amend application, Board to treat both applications together - If Bricklayers decline to amend application, Board consideration of that application to be postponed until final disposition of Labourers' application

BEFORE: S. Liang, Vice-Chair, and Board Members W. N. Fraser and J. Redshaw.

APPEARANCES: N. Jesin, T. Hawtin and Paulo Ferreirinha for the applicant; L. A. Richmond and O. Ceolin for Labourers' Local 183.

DECISION OF THE BOARD; December 10, 1991

- 1. The name of the respondent is amended to read: "554538 Ontario Limited", with respect to both applications.
- 2. These matters are applications for certification which relate to overlapping, but not identical, bargaining units of employees employed by the respondent. The parties appeared before this panel of the Board to present argument as to how the Board should deal with the applications, and in particular, how it should exercise its discretion under section 103(3) of the *Labour Relations Act* ("the Act").
- 3. On July 10, 1991, the Labourers' International Union of North America, Local 183 ("Local 183") filed an application for certification with respect to employees of the respondent. The bargaining unit sought by Local 183, as amended by its letter of August 20, was the following:

"all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in all sectors of the construction industry, save and except the industrial, commercial and institutional sectors, in Ontario Labour Relations Board Area Number 8, save and except non-working foremen and persons above the rank of non-working foreman."

4. When the application was filed, the Board set July 24, 1991 as the terminal date. On July 31, the International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario ("Local 2") filed its own application with respect to employees of the respondent. Local 2 is an affiliated bargaining agent of a designated employee bargaining agency, pursuant to a designation order issued under section 139(1) of the Act on April 12, 1978. Local 2 sought two bargaining units in its application, being the following:

Bargaining Unit No. 1

(a) all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except nonworking foremen and persons above the rank of non-working foreman; and

(b) all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman;

Bargaining Unit No. 2

(a) all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

(Although the Local 2 bargaining units include stonemasons and their apprentices, since neither party asserts there are actually stonemasons in the employ of the respondent we shall, for ease of reference, refer subsequently only to bricklayers.)

- 5. The Board processed the application by Local 2 as a separate application, setting August 15 as the terminal date. Subsequent to the application by Local 2, the Board became aware that the Notice to Employees with respect to the application by Local 183 had not been posted at the workplace. As a result, the Board found it necessary to re-process the Local 183 application, setting a new terminal date of September 17.
- 6. Section 103(3) of the Act states:

103.-(3) Notwithstanding sections 5 and 57, where an application has been made for certification of a trade union as bargaining agent for employees in a bargaining unit or for a declaration that the trade union no longer represents the employees in a bargaining unit and a final decision of the application has not been issued by the Board at the time a subsequent application for such certification or for such a declaration is made with respect to any of the employees affected by the original application, the Board may,

- (a) treat the subsequent application as having been made on the date of the making of the original application;
- (b) postpone consideration of the subsequent application until a final decision has been issued on the original application and thereafter consider the subsequent application but subject to any final decision issued by the Board on the original application; or
- (c) refuse to entertain the subsequent application.

In this case, the application by Local 2 was made at a time when no final determination with respect to the application by Local 183 had been made by the Board. The issue addressed by the parties was whether the Board should defer consideration of the application by Local 2 until the final disposition of the other, or whether the Board should deal with both applications together.

7. At the outset of the hearing, Local 183 raised a question as to whether Local 2 would have status to intervene in its own application at all, since it had no information that Local 2 represents any of the employees who are the subject of the Local 183 application. No list of employees has been filed by the respondent. The Board determined, assuming for this purpose the accuracy

of the information supplied by Local 183 in its application, that Local 2 represents at least one employee in the unit sought by Local 183, and informed the parties of this.

Positions of the Parties

- 8. The parties are agreed that when faced with competing applications for certification, the normal practice of the Board has been to determine whether the second application was filed before the terminal date set for the first application. If so, the Board's practice is to apply section 103(3)(a) of the Act, treating the subsequent application as having been made on the date of the first application and dealing with both together. Local 183 submits that there is no reason for the Board to depart from its normal practice in this case. Local 2, on the other hand, argues that the normal Board policy leads to irrational results in the present circumstances and that the Board should instead apply 103(3)(b). Local 2 thus asks that its own application be deferred.
- 9. Both parties explored in detail the issues which would arise should the Board exercise its discretion to deal with both applications together. In particular, much argument was directed to the structure of the vote which would ultimately be held, assuming both applicants demonstrated sufficient membership support. Both applicants agree that the Board should strive for votes which are rationally structured, consistent with the provisions of the Act, and clear to the voters.
- 10. Local 183 submits that these goals can be achieved. Its suggestion is that the vote can be held in either one of the following ways:
 - a. Two voting constituencies would be established, consisting of (i) bricklayers and their apprentices, in all sectors in Board Area 8 excluding the industrial, commercial and institutional sectors ("the ICI") and (ii) construction labourers in all sectors in Board Area 8 excluding the ICI. In this proposed model, if Local 2 wins the vote in (i) above, then it would be given bargaining rights which include the ICI sector for the province and reflect is designation.
 - b. One voting constituency would be established encompassing all bricklayers and their apprentices and all construction labourers in all sectors in Board Area 8 excluding the ICI. Depending on the results of this vote, there may be a need for a second vote.
- Local 2 submits that there are a number of problems with the models proposed by Local 183. In both models, bricklayers and their apprentices would not be given the option to choose Local 2, which is an affiliated bargaining agent, to represent them in the ICI sector. Further, there will potentially be a need for a sector inquiry, in order to determine which bricklayers would be in the voting constituencies. Also, under these models, there is the potential for *both* unions to gain majority support under the same vote for a unit for which it has applied. In the submissions of counsel, this is an appropriate case for the Board to depart from its normal policy. Local 2 submits that in these circumstances, it ought to be given an opportunity to amend its application so as to conform to the bargaining unit sought by Local 183. If it chooses not to amend its bargaining units, then the Board ought to defer its application, applying section 103(3)(b) of the Act.
- 12. The parties referred the Board to some cases illustrating aspects of the arguments. *Baywood Carpentry Limited*, Board File No. 3343-86-R, March 27, 1987, unreported, is a case that both parties urged the Board not to follow. In that case, the Board struck two voting constituencies in a pre-hearing vote. The first voting constituency reflected a carpenters and carpenters apprentices bargaining unit under section 144(1) of the Act, and the second, a carpenters and carpenters'

apprentices bargaining unit under section 144(3). The two voting constituencies thus overlapped with respect to the carpenters and carpenters' apprentices in the named Board area in sectors excluding the ICI sector. The parties agreed that such a vote would not be easily comprehensible to employees voting and could lead to contradictory results.

Decision of the Board

- 13. We have carefully considered the results which might flow if this Board applies its normal policy under section 103(3) to the present applications. In our view, Local 2 raises some compelling concerns about the reasonableness of the Board's policy in competing applications under the construction provisions of the Act, where the bargaining units sought overlap but are not congruent and encompass both sections 144(1) and 144(3) of the Act.
- As was recognised by the parties, it is only reasonable to deal with these two applications together if the vote which might ultimately be held is capable of testing the true wishes of the employees. The crux of the problems raised by these applications, in our view, is that *both* unions may gain majority support in a vote which encompassed all the bargaining units sought by both parties. For instance, Local 183 may win the majority of ballots in a voting constituency composed of all bricklayers, bricklayers' apprentices and construction labourers in all sectors in Board Area 8, excluding the ICI sector. However, in the very same vote, Local 2 may win the majority of ballots cast on the part of bricklayers and bricklayers' apprentices. Assuming there are no bricklayers in the ICI sector, this vote result would ordinarily entitle Local 2 to a certificate under section 144(1) of the Act. The Board would be faced with two certifiable units which overlap and cannot both stand. In the face of such a result, it is difficult to determine precisely what are the true wishes of the employees.
- 15. A related concern which we have with the suggestions of counsel for Local 183 is that the models which he has proposed involve the Board in testing the wishes of employees, without knowing what the outcome of the bargaining units will be. Arguably, the wishes of the employees may be affected depending on what bargaining units are ultimately certified. Although we appreciate that the Board has not seen this as an obstacle when an applicant has asked for a pre-hearing vote, in regular applications for certifications, the practice of the Board and the manner in which it has applied sections 6(1) and 7(1) and (2) of the Act, is to define the bargaining unit before the taking of a representation vote.
- 16. In addition to the above, the complexities of a vote which involves three overlapping bargaining units in two applications would be compounded by the Board's practice of offering a "no-union" option, depending on the membership evidence (i.e. depending on whether both applicants have more than 55 per cent support). The possibility would exist for a ballot without a "no-union" choice in one voting constituency, and with a "no-union" choice in another.
- We do not find the models proposed by Local 183 to be helpful in addressing the above issues. Model (a) defines voting constituencies in a manner which is a departure from *any* of the bargaining units which are the subject of these applications. Model (b) reflects the bargaining unit sought by Local 183. However, it combines with respect to the application by Local 2, half of the bargaining unit sought under section 144(1) of the Act (see paragraph 4 above) with the bargaining unit sought under section 144(3). In the result, such a voting constituency would permit employees in one bargaining unit to have a say in the fate of another bargaining unit.
- 18. In these circumstances, we are not convinced that holding a vote along the above models would adequately test the true wishes of the employees with respect to the bargaining units sought under these applications. After much consideration, we do not find any way in which we

can avoid the intractable problem which combining these two applications would pose, and which the models proposed do not solve - that both unions may find themselves in a certifiable position with overlapping bargaining units.

- 19. In the result, we find the factors cited above to be compelling reasons in the circumstances of this case to defer the application for certification by Local 2. In our view, the result which we have arrived at is a realistic one which takes into account interests on all sides. Local 183 has the right to have its application dealt with expeditiously, without being side-tracked by endless debate as to the most rational way to structure a vote between the two unions. All parties have an interest, where there is legitimate question as to which of two unions the employees prefer as their bargaining agent, in having a vote which rationally, clearly and simply expresses the wishes of the employees. Local 2 has the right to intervene in an application where it represents employees, or to file its own application for certification by way of intervention.
- 20. By choosing to defer, the Board is not ignoring the fact that a subsequent application for certification may throw some doubt on the wishes of the employees in the initial application as to their bargaining representative. The reality is that if a union other than the applicant asserts that it represents employees' wishes, it may simply intervene without filing its own certification application. However, to the extent that it wishes to assert its own application for certification within the context of a pre-existing application (in the Board's terminology, an Application for Certification By Intervener), a subsequent union may have to bring its application within the framework already established, so that the employees' wishes can be unequivocally determined.
- Before concluding, we note that neither party addressed the fact that the application by Local 2 was not filed as an Application for Certification by Intervener and was filed on a date which was after the terminal date originally set by the Board for the Local 183 application. Indeed, were it not for the extension of the terminal date, the Board's normal practice would have been to defer consideration of Local 2 application in any event. On its face, the document filed by Local 2 does not show an intention to intervene in the application by Local 183. A decision by the Board to treat such a document as an Application for Certification by Intervener may have important consequences for a subsequent union. It also has obvious consequences for the original applicant. This union will ordinarily be held to the same application date and terminal date as that of the first union. By this decision, we are not stating that the Board will necessarily apply section 103(3)(a) where the bargaining units applied for in the competing applications are congruent, but where a subsequent union had no intention of intervening.
- 22. Local 2 submits that in the circumstances of this case, it ought to be given the opportunity to amend its bargaining unit. Since this is perhaps the first case in which this issue has been so clearly addressed, we feel it would not be fair to apply our decision prior to allowing Local 2 this opportunity. In any case, such an amendment comes at a very preliminary stage of these proceedings. If the result of the amendment is that the Board is faced with two applications for certification with respect to the same bargaining unit there will be no reason for the Board, in this case, to defer the second application.
- 23. The Board therefore directs that Local 2 notify the Board, within 10 days of the receipt of this decision, whether it intends to amend its bargaining unit to correspond to the bargaining unit sought by Local 183. If Local 2 declines to amend its application, the Board's consideration of that application will be postponed until the final disposition of the Local 183 application. If Local 2 amends its application, the Board will from then on treat it as having been made on the date of the Local 183 application, assign it the same terminal date, and deal with both applications together. In either case, the Board appoints a Labour Relations Officer to convene a meeting with respect to

the Local 183 application, or both applications, as the case may be in order to narrow and define the remaining issues in dispute.

24. This panel is not seized.

0893-91-R, 1119-91-R Labourers' International Union of North America, Local 183, Applicant v. C. Santos Masonry, Respondent v. International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario, Intervener

Certification - Construction Industry - Bricklayers' intervener's certification application received by Board after Labourers' certification application withdrawn - Intervener's certification application not processed due to administrative error - Labourers filing second certification application - Board assigning Bricklayers application date of earlier Labourers' application, but extending terminal date - Board giving Labourers election to designate second application as intervener's certification application or to have consideration deferred until Bricklayers' application disposed of

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members W. N. Fraser and R. R. Montague.

APPEARANCES: Lorne Richmond for the applicant; Norman L. Jesin for the intervener; no one appearing on behalf of the respondent.

DECISION OF THE BOARD; December 11, 1991

I

- 1. These are two related certification applications which came on for hearing together, and can be dealt with in a single decision. For ease of reference, the unions involved will be referred to simply as "the Labourers" and "the Bricklayers". The only provision of the *Labour Relations Act* to which reference need be made is section 103(3) which reads as follows:
 - 103.-(3) Notwithstanding sections 5 and 57, where an application has been made for certification of a trade union as bargaining agent for employees in a bargaining unit or for a declaration that the trade union no longer represents the employees in a bargaining unit and a final decision of the application has not been issued by the Board at the time a subsequent application for such certification or for such a declaration is made with respect to any of the employees affected by the original application, the Board may,
 - (a) treat the subsequent application as having been made on the date of the making of the original application;
 - (b) postpone consideration of the subsequent application until a final decision has been issued on the original application and thereafter consider the subsequent application but subject to any final decision issued by the Board on the original application; or
 - (c) refuse to entertain the subsequent application.
- 2. In order to appreciate the initial problem raised in these applications, it is necessary to

sketch in some background about when they were received and how they were processed. That history is set out below in chronological order:

- June 13 Labourers file certification application 0893-91-R.
- June 19 Registrar sets June 27 as the "terminal date" in File 0893-91-R.
- June 26 Bricklayers file Form 84, intervener's certification application by registered mail. This application is deemed to have been made on June 26 (see section 113(2) of the Act) even though neither the Board nor anyone else will become aware of it until it is delivered to the Board eight days later. The Bricklayers' intervener's certification application is accompanied by supporting membership evidence and Form 80 declaration.
- June 28 Labourers request leave to withdraw their certification application in File 0893-91-R.
- June 28 Board grants Labourers leave to withdraw their application (being unaware of any intervention) and a copy of that decision is sent to the *then* parties of record: the Labourers and the employer.
 - Certification application 0893-91-R is now "closed" and filed away as a "Dead" file.
- June 28 Labourers file a new certification application (eventually numbered 1119-91-R) by registered mail, which is deemed filed on June 28 although, again, the Board will not become aware of it for a few days.
- July 2 The Board receives Labourers' second application, numbers it 1119-91-R and sets a new terminal date of July 17.
- July 3 Bricklayers' intervener's application in 0893-91-R is received by the Board 8 days after mailing and "deemed" filing, but is not processed administratively because File 0893-91-R is apparently "Dead". No notice or acknowledgement of this "new" *Bricklayers* intervener's certification application is given to the employer or the employees, because the initiating application by the Labourers, to which this is a response, has been withdrawn.
- August 27 Counsel for the *Bricklayers* brings these problems to the attention of the Board.
- August 27 Bricklayers file Form 83 intervention in the Labourers' second certification File 1119-91-R, asserting that File 1119-91-R should not proceed because the Bricklayers have their own prior certification pending before the Board (i.e. their June 26th intervener's application) in File 0893-91-R. This Bricklayers' intervention in File 1119-91-R is not an intervener's certification application, just a "simple" intervention in Form 83.

Sept. 11 - Registrar gives parties notice of hearing, captioning both files numbers, together with an accompanying letter that includes: the letter from Bricklayers' counsel dated August 27, 1991, a copy of the June 26th Bricklayers' application for certification by intervener [Form 84] and a copy of the Bricklayers' "simple" intervention in File 1119-91-R.

П

- 3. In the course of a year, the Board receives and processes thousands of certification applications. Some of them are multi-party matters in which more than one trade union has an interest in the proceeding. Both labour relations policy and the Board's Rules require it to process those applications within fairly tight time frames; moreover, because of the deemed filing provisions of section 113 of the Act, legally significant events can occur some days before the Board actually learns about them or is able to respond. Given the vagaries of the mails and the volume of material, some administrative error is inevitable. Computerized cross-checking of respondent employer names will ordinarily identify pending files which are potentially related to new ones, but the system is not perfect, and can fail where, as here, there are multiple applications, filed in rapid succession, relying on the deemed filing rules of section 113 of the Act.
- 4. In the instant cases, what seems to have happened is this. On July 3, 1991, when the Board physically received the Bricklayers' Form 84 application for certification by intervener, File 0893-91-R was already "Dead". The Labourers had withdrawn the application which established that file, and this had been confirmed by a decision of the Board. At that point, the Labourers and the employer were the only parties of record, and as between them, the proceeding had been properly terminated. Instead of "reviving" File 0893-91-R and sending it to a hearing, or treating the "intervention" as a new application unrelated to any other "live" file, the new material was simply filed away. It was treated as a Form 83 "intervention" (i.e. what the Bricklayers actually did file in File 1119-91-R) in a closed matter, rather than what it really was: a new certification application filed in response to the Labourers' application, but which, nevertheless, could stand on its own and which was deemed to have been filed before the disposition of 0893-91-R, even though it was not in fact received until some days later.
- 5. What is the result, and what is to be done?
- 6. It appears to us that the certification application filed by the Bricklayers in File 0893-91-R on June 26 is timely, and the Board must proceed with it. The Labourers' first application was and remains withdrawn. If there were no notice problem, under section 103(3)(a) the Board would ordinarily treat the Bricklayers' application as having been made on the date of the making of the Labourers' application, and give the Bricklayers' application the same terminal date. That is the Board's practice and what the Bricklayers would have expected to be the response to their intervener's certification application. (Indeed, that is no doubt why they hastened to get their application and supporting evidence filed prior to the terminal date of File 0893-91-R.) The Board would then resolve the application on the basis of the membership evidence filed by the union and/or such representation vote as the Board considered necessary to establish the employees' wishes.
- 7. But there is a notice problem. Because the Bricklayers' Form 84 application for certification by intervener was not processed, there has been no posting or other notice to employees that such application is before the Board and might affect them. No doubt a number of the employees have signed membership cards for one or both of the two unions now before us so that they will know of the competing organizing campaigns and the possibility of certification applica-

tions. But the employees have had no actual notice that a Bricklayers' certification application has actually been made. As counsel for the Labourers points out: it would be odd to proceed with the Bricklayers' application and potentially issue a certificate, when the only application of which the employees would be aware involves another trade union. In the circumstances therefore, while we are satisfied that the Bricklayers' intervener application for certification should be treated as if it had been made on June 13, 1991, the terminal date should be extended to December 20, 1991 so that notice can be given to the employees of the Bricklayers' application and the bargaining units which the Bricklayers seek to represent.

- 8. What about the Labourers' "new" certification application (File 1119-91-R)? Here too, in the facts of this case, there is a somewhat unexpected interaction between the Board's practice under section 103, and the deemed filing provisions of section 113.
- 9. At the time that the Labourers filed 1119-91-R, they did not know, and could not know, that the Bricklayers' application had been made, let alone that it was deemed to have been "filed" (by virtue of section 113) two days before their own. This, in itself, is not so unusual in a system which envisages "deemed filing" by registered mail, and legal notice by ordinary mail rather than personal service or actual delivery. In any situation where two unions are organizing, one or the other or both may make applications without precise knowledge of the other's activities. But that situation has been compounded here by the Board's own administrative error in failing to process the Bricklayers' application or give notice of it.
- 10. With the extension of the terminal date required by the failure to give notice of the Bricklayers' intervener's certification application, the Labourers' second application becomes, *de facto*, one filed prior to the extended terminal date. Such application would, ordinarily, "pick up" the application date and terminal date of the prior application if the second union chose to *intervene* by means of its own application, or would be held down until the first application was disposed of if the second union was prepared to wait or if, by chance, it did not get its material in on time (i.e., prior to the first union's terminal date). That choice or result may be important in the construction industry where the application date can be critical for the composition of the bargaining unit and therefore the success of the union's application. In other words, because the application date is particularly important, there may be a real difference between a mere intervention, an intervention by certification application prior to the terminal date (which would "pick up" the first union's application and terminal date) and a subsequent certification application, usually after the terminal date, which would have its own application and terminal date even though it would not be dealt with until the first one was disposed of.
- While the matter is not free from doubt, in the unusual circumstances of this case, we think it appropriate to put the Labourers to an election: designate their second application in File 1119-91-R as an intervener's certification application in which case it will pick up the Bricklayers' application date and terminal date (as extended above); or treat their new application as a subsequent one preserving their own application date (June 28) and terminal date (July 17), but accepting that their second application would not be dealt with until after the Bricklayers' application has been finally disposed of.
- 12. There is no perfect solution in this situation, but, in our opinion, the one outlined above appropriately accommodates the various interests involved. The Labourers will have seven days from the date hereof to advise the Board, in writing, of its election.
- 13. This matter will be rescheduled for hearing in the ordinary course.
- 14. This panel is not seized. However, we observe, parenthetically, that the difficulties

highlighted by this case, the ongoing rivalry between the two unions in this matter, and the likelihood of similar problems occurring again, may well prompt the Board to reconsider the way in which its discretion under section 103 and the Rules should be exercised in construction industry certification cases.

0370-91-G International Association of Bridge, Structural and Ornamental Ironworkers, Local 786, Applicant v. Canron Inc., Respondent

Construction Industry - Construction Industry Grievance - Union seeking leave to withdraw referral - Employer asking that Board dismiss the grievance - Board permitting union to withdraw referral

BEFORE: Bram Herlich, Vice-Chair, and Board Members D. A. MacDonald and C. A. Ballentine.

APPEARANCES: Elizabeth M. Mitchell, Dan Girard and Armand Sonier for the applicant; Robin B. Cumine and Larry Davis for the respondent.

DECISION OF THE BOARD; December 10, 1991

- 1. This is a referral of a grievance pursuant to section 124 of the *Labour Relations Act*.
- 2. Hearing in this matter commenced on June 11, 1991 and was scheduled to continue on August 23, 1991. On that day the parties advised the Board that they wished the matter to be adjourned for purposes of negotiations.
- 3. By letter dated November 14, 1991, the applicant seeks leave of the Board to withdraw this referral. The respondent, by letter dated November 18, 1991, asks that the Board dismiss the grievance.
- 4. The Board has considered the submissions of the parties and sees no compelling reason to prevent the applicant from withdrawing its own grievance.
- 5. Accordingly this referral is hereby withdrawn by leave of the Board.

0796-91-JD; 0797-91-U; 1060-91-G International Association of Bridge, Structural and Ornamental Ironworkers; International Association of Bridge, Structural and Ornamental Ironworkers, Local 736, Complainants v. Electrical Power Systems Construction Association; Ontario Hydro; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, Respondents; International Association of Bridge, Structural and Ornamental Ironworkers, International Association of Bridge, Structural and Ornamental Ironworkers, Local 736, Applicants v. Electrical Power Systems Construction Association, Ontario Hydro, Respondents

Construction Industry - Jurisdictional Dispute - Practice and Procedure - Unfair Labour Practice - Board dismissing unfair labour practice complaint for failing to disclose a *prima facie* case - Board satisfied that Administrator of Plan for Settlement of Jurisdictional Disputes made clear decision and Board, therefore, assuming jurisdiction under section 91(14) of the *Act* - Board deferring complaint under section 91(1) until Board's decision under section 91(14) has issued

BEFORE: Robert Herman, Vice-Chair, and Board Members J. Lear and J. Kurchak.

APPEARANCES: S.B.D. Wahl and B. Doherty for the applicant; J. James Nyman and Hugh Laird for respondents, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, and Local 128; Harvey A. Beresford and Guy W. Giorno for respondents Electrical Power Systems Construction Association and Ontario Hydro.

DECISION OF THE BOARD; December 17, 1991

- 1. The International Association of Bridge, Structural and Ornamental Ironworkers, and Local 736 of that union ("Ironworkers" or "Local 736") have filed three related matters, which in essence all complain about a particular assignment of work, and change in assignment of work, made by the respondent Electrical Power Systems Construction Association ("EPSCA") and Ontario Hydro ("Hydro") to the other respondents, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, and Local 128 of the International ("Boilermakers" or "Local 128"). In its jurisdictional complaint, filed pursuant to section 91 of the Labour Relations Act, the Ironworkers complain both about the assignment made to the Boilermakers, and a change of assignment earlier made to the Ironworkers. They also rely upon the provisions of section 91(14) of the Act, asking that this Board enforce the order of the decision of the Plan for the Settlement of Jurisdictional Disputes in the construction industry. In a related section 89 complaint, the Ironworkers allege that the conduct of EPSCA and Hydro in changing one assignment and in making others constitutes breaches of sections 50, 51, 64, 66, 67, 70, and 91 of the Act. Finally, a section 124 application has been filed, alleging that the final assignment was improper and claiming the lost wages and benefits.
- 2. At the hearing into this matter, the Board made several preliminary rulings. This decision deals with those oral rulings. The Board ruled that the 124 application (Board File No.1060-91-G) would be deferred for the time being, until the other two proceedings were resolved, or the Board otherwise directed.
- 3. The Board then considered the objection of the respondents that the section 89 complaint failed to disclose a *prima facie* case, and that it ought therefore to be dismissed. The Board

accepted the facts as pleaded by the complainants, subject to additional facts apparently not in dispute from the parties' submissions. These facts however were accepted as true and provable solely for the purposes of dealing with the preliminary objections.

- Briefly, the dispute arose when certain work was assigned by Hydro, after a mark-up meeting attended by, amongst others, representatives of the Ironworkers and the Boilermakers. Disputed assignments were made with respect to certain work associated with condensers, and with respect to other work associated with reheaters. The condenser work in dispute was finished around March 15, 1991, and the reheaters work was finished around June 25, 1991. It is not necessary to further detail the work in dispute. Simply put, the Ironworkers complain of two matters. First, they allege that the assignment of particular work was made by Hydro to the Ironworkers but that Hydro later wrongly changed that final assignment. In response to the change, the Ironworkers complained to the Plan for the Settlement of Jurisdictional Disputes in the construction industry, to which the relevant parties had all stipulated, or were bound. As a result of that complaint and the forwarding of submissions to the Plan, the parties received a decision made by the Administrator of that Plan, which directed that Hydro reinstate or return to the original assignment, that in favour of the Ironworkers. Pursuant to the provisions of section 91(14) of the Act, the Ironworkers now ask that the Board enforce the decision of the Administrator.
- 5. Second, the Ironworkers allege that certain work, involving both the condensers and reheaters and including the work that was subject of the complaint about the change in final assignment referred to immediately above, ought to have been assigned by Hydro to the Ironworkers. In this respect, the Ironworkers rely upon the provisions of section 91(1) of the Act, and complain in a more typical fashion pursuant to the jurisdictional dispute complaint provisions.
- 6. The relevant provisions of the Act read as follows:
 - 50. A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.
 - 51.-(1) A collective agreement between an employers' organization and a trade union or council of trade unions is, subject to and for the purposes of this Act, binding upon the employers' organization and each person who was a member of the employers' organization at the time the agreement was entered into and on whose behalf the employers' organization bargained with the trade union or council of trade unions as if it was made between each of such persons and the trade union or council of trade unions and upon the employees in the bargaining unit defined in the agreement, and, if any such person ceases to be a member of the employers' organization during the term of operation of the agreement, he shall, for the remainder of the term of operation of the agreement, be deemed to be a party to a like agreement with the trade union or council of trade unions.
 - (2) When an employers' organization commences to bargain with a trade union or council of trade unions, it shall deliver to the trade union, or council of trade unions a list of the names of the employers on whose behalf it is bargaining and, in default of so doing, it shall be deemed to bargain for all members of the employers' organization for whose employees the trade union or council of trade union is entitled to bargain and to make a collective agreement at that time, except an employer who, either by himself or through the employers' organization, has notified the trade union or council of trade unions in writing before the agreement was entered into that he will not be bound by a collective agreement between the employers' organization and the trade union or council of trade unions.
 - (3) A collective agreement between a certified council of trade unions and an employer is, subject to and for the purposes of this Act, binding upon each trade union that is a constituent union of such a council as if it had been made between each of such trade unions and the employer.

- (4) A collective agreement between a council of trade unions, other than a certified council of trade unions, and an employer or an employers' organization is, subject to and for the purposes of this Act, binding upon the council of trade unions and each trade union that was a member of or affiliated with the council of trade unions at the time the agreement was entered into and on whose behalf the council of trade unions bargained with the employer or employers' organization as if it was made between each organization, and upon the employees in the bargaining unit defined in the agreement and, if any such trade union ceases to be a member of or affiliated with the council of trade unions during the term of operation of the agreement, it shall, for the remainder of the term of operation of the agreement, be deemed to be a party to the like agreement with the employer or employers' organization, as the case may be.
- (5) Where a council of trade unions, other than a certified council of trade unions, commences to bargain with an employer or an employers' organization, it shall deliver to the employer or employers' organization a list of the names of the trade unions on whose behalf it is bargaining and, in default of so doing, it shall be deemed to bargain for all members or affiliates of the council of trade unions for whose employees the respective trade unions are entitled to bargain and to make a collective agreement at that time with the employer or the employers' organization, except a trade union that, either by itself or through the council of trade unions, has notified the employer or employer's organization in writing before the agreement is entered into that it will not be bound by a collective agreement between the council of trade unions and the employer or employers' organization.
- 64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.
- 66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,
 - shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
 - (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
 - (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.
- 67.-(1) No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargaining with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.
- (2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall, so long as another trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with an employer or an employers' organization on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.
- 70. No person, trade union or employers' organization shall seek by intimidation or coercion to

compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

- 91.-(1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.
- (2) The Board may in any direction made under subsection (1) provide that it shall be binding on the parties for other jobs then in existence or undertaken in the future in such geographic area as the Board considers advisable.
- (8) Where a complaint is made under subsection (1) and the complainant alleges that a strike is imminent or is taking place by reason of the requirement as to the assignment of work or by reason of the assignment of work, the Board may, after consulting any employer, employers' organization, trade union or council of trade unions that in its opinion is concerned, make such interim order with respect to the assignment of the work as it in its discretion considers proper.
- (14) The Board shall not inquire into a complaint made by a trade union, council of trade unions, employer or employers' organization that has entered into a collective agreement that contains a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement, and such trade union, council of trade unions, employer or employers' organization shall do or abstain from doing anything required of it by the decision of such tribunal.
- The section 89 complaint, other than its reliance upon the provisions of section 91(14) of the Act, can be disposed of quickly, as there is little merit to it. The complainant alleges that section 50 has been breached in that Hydro ignored the provisions of the applicable collective agreement. It asserts that section 51 was breached because that section deals with the binding nature of any collective agreement and Hydro did not conduct itself in a manner that recognized that. Section 64 is alleged to have been breached because Hydro's conduct interfered with the representational rights of the Ironworkers. Section 66, it was submitted, was breached because Hydro refused to employ Ironworkers to do the work in dispute. Section 70 was alleged to have been breached because Hydro's conduct constituted intimidation in the circumstances.
- 8. There is simply nothing in the facts as pleaded which constitutes any *prima facie* indication that these sections have been breached. Rather, the complaint appears to be a relatively transparent attempt to characterize a dispute over the correct assignment of particular work into an unfair labour practice. Such a work assignment dispute is precisely the purpose of the jurisdictional dispute proceedings. This point has been stated on numerous occasions by the Board, the most recent being *Peter Kiewit Sons Co. Ltd.* [1991] OLRB Rep. July 881. Reference can be made to that decision for a recital of the pertinent jurisprudence. For our purposes, it is sufficient to conclude that the facts do not disclose a *prima facie* case with respect to the sections pleaded (other than section 91(14)), and in any event, even if they had, the Board would exercise its discretion not to enquire further into those complaints, given that the root and basis of the complaint is a dispute with respect to a work assignment, and not truly an unfair labour practice. For these reasons, at the hearing the Board dismissed the complaint pursuant to section 89, except insofar as it relied upon the provisions of section 91(14) of the Act.

- With respect to the complaints pursuant to sections 91(14) and 91(1) of the Act, the respondents argued that the Board has no jurisdiction to entertain them. First, the respondents argue that the complainants, having elected to seek an answer from the Plan, cannot at this stage turn to the Board for enforcement. The Collective Agreement (Article 6.3) gives the Ironworkers the right to elect whether to pursue or respond to a jurisdictional dispute at either the Ontario Labour Relations Board or the Plan. Where the Ironworkers elect to pursue or respond to the dispute at the Plan, as is the case here, the respondents assert that paragraph 6.3(b) of the Collective Agreement applies, which binds the parties to the Procedural Rules and Regulations of the Plan. Under those Rules, where a dispute cannot be settled by the parties on a local basis, it can be referred to the Plan. The Administrator under the Plan is to determine all questions of the original assignment of work and render decisions regarding them. Under Article 1.2.c of the Plan, an appeal of the Administrator's determination of the original assignment may be made to an arbitrator. No party here has appealed to the arbitrator. Article 6.6 of the collective agreement indicates that where the Plan fails to render a decision within sixty days of the disputed assignment being referred to it, then the parties have recourse to this Board. The respondents assert that the complainants are not able to return to the Board at this stage for enforcement of the Administrator's decision. They must, at least, have referred the matter to arbitration and waited for sixty days after the matter was so referred before coming here.
- 10. Second, the respondents asserted that the enforcement procedure pursuant to section 91(14) is only available where the "decision" sought to be enforced is clear and unambiguous, and does not involve any interpretation of or dispute about the facts. Here, the respondents asserted the Administrator's decision is not sufficiently clear nor are the facts agreed. In such circumstances, the respondents asserted that the Board has no jurisdiction under section 91(14).
- Third, the respondents asserted that the Board cannot, as a matter of jurisdiction, 11. entertain the section 91(14) complaint without first deciding that there is no proper complaint pursuant to section 91(1). On the wording of section 91(14), the Board is not able to inquire into a complaint involving a work dispute where the collective agreement contains a provision requiring the reference of such a difference to a tribunal mutually selected by the parties to the agreement. If such a tribunal has been agreed to, the Board will dismiss a section 91(1) complaint. Under section 91(14), where such a tribunal has been agreed to, resort can however be made to the Board for enforcement of decisions of the tribunal. The complainants, it is submitted, cannot have it both ways. In the complaint filed under subsection 1 of section 91, the complainants are asserting that the parties have not mutually selected and agreed to another tribunal for resolving the work assignments. In contrast, in the complaint under subsection 14, the complainants are asserting that the parties have agreed to go to a mutually selected tribunal and not this Board. The Board is being asked only to enforce the decision of such tribunal. The complainants complain pursuant to both subsections 1 and 14. The respondents argued that they are thereby raising inconsistent and mutually exclusive complaints. The respondents submitted that the Board must first decide whether or not the parties have agreed, in their respective collective agreements, to refer such differences to an outside tribunal. If it so concludes, the Board has (on this argument) jurisdiction to entertain the section 91(14) complaint, but it must then dismiss the complaint with respect to subsection 1. The two cannot stand together. Thus, argued the respondents, as a matter of jurisdiction, the Board must decide whether it can hear the section 91(1) complaint before it can entertain the 91(14) complaint.
- 12. The Board declined to dismiss the complaint on these grounds. The Board was satisfied that the Administrator of the Plan had made a decision, specifically in her letter to the parties of June 21, 1991. That decision was clear, and it directed that Hydro revert to the original assignments it had made on or about February 12, 1991. This decision having been made, the Board was

satisfied that it had jurisdiction under section 91(14). A decision had clearly been made by a tribunal, by the Administrator of the Plan, and the Board was being asked to enforce that decision. Any concerns about ambiguity in the decision, or dispute with respect to what the decision covered, are matters that can be dealt with as part of an adjudication into the merits of the section 91(14) complaint. It would render that subsection without practical substance if the Board only had jurisdiction where the party against which a decision had been made agreed with all the facts, or did not assert that the decision had some ambiguity. Where the facts as pleaded disclose that a decision has been made, arising out of a tribunal that falls within the ambit of section 91(14), then the Board has jurisdiction to entertain the complaint.

- 13. It does not appear from the Rules of the Plan, and the parties' submissions, that the decision of the Administrator could have been appealed to an arbitrator. But even if it could have, no appeal has in fact been made. There is nothing in either the Plan or the collective agreement which would accordingly oust the Board's jurisdiction under section 91(14). The matter before us was referred to the Administrator and the Administrator made a decision. Only after that decision was reached and forwarded to the parties did the Ironworkers file the complaint, seeking enforcement of that decision. These circumstances distinguish the instant scenario from those dealt with in prior decisions of the Board: see, for example, *EPSCA* (unreported, Board File No. 0053-83-M, 1984).
- The complainants do not at this stage press their section 91(1) complaint. After the section 91(14) complaint has been adjudicated upon, the Board can then deal with the complaint pursuant to section 91(1). It may be that the Board will conclude that it has no jurisdiction in that respect. But it is not in our view appropriate at this stage to conclude that either the complaint under subsection 1 or that under subsection 14 must be dismissed, merely because the complainants have filed both. The more appropriate procedure is to defer consideration of whether the Board has jurisdiction with respect to the work assignment complaint filed under subsection 1, until such time as the request for enforcement pursuant to subsection 14 has been finally resolved. The complainants' argument, that the dispute has two severable and distinct aspects might prevail; first, the complaint over the change in assignment, the subject of the Administrator's decision and the section 91(14) enforcement request, and second, the complaint about the assignment itself, the subject of the section 91(1) complaint. The complainants assert that only the change in assignment has been referred to the tribunal, and it does not encompass, in any event, all the work in dispute. They submit that such reference, involving a complaint about a change in a final assignment with respect to only part of the work in dispute in the section 91(1) complaint, ought not to in any way affect the right of the complainants to refer the assignment dispute itself to this Board. The section 91(1) complaint is a dispute over work which was assigned to the respondent unions. The section 91(14) complaint is based upon a claim that Hydro changed an assignment it had already made to the complainants. See, for example, Stoney Creek Mechanical Limited [1982] OLRB Rep. Dec. 1917, which discusses the distinction between these two types of complaint. It may be that the Board will agree to entertain the section 91(1) complaint based upon the complainant's assertion above, but we need not decide that issue now in order to have jurisdiction to consider the section 91(14) complaint, nor must the complainant elect to, in effect, withdraw one or the other of its complaints.
- 15. Therefore, the complaint under subsection 1 will be deferred until after the Board's decision has issued on the section 91(14) complaint. Pursuant to the discussion among the parties, and their agreements, the Board directs that by January 20, 1992, each party shall deliver to the other parties, and to the Board, a statement of all the material facts which they wish to lead in evidence or rely upon in any fashion in the proceedings, which have not yet already been pleaded in their materials. The parties will not, except with leave of the Board, be allowed to lead evidence,

or cross-examine other witnesses, with respect to material facts not so disclosed in the materials already filed or to be delivered and filed by January 20, 1992.

- 16. A Board Officer is hereby appointed to meet with and confer with the parties, in an effort to narrow the issues or otherwise settle these matters.
- 17. These matters will continue, before the instant panel, on May 12, May 13, and June 23, 1992.

2777-87-G United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. Ellis Don Limited, Respondent

Construction Industry - Construction Industry Grievance - Damages - Remedies - In 1988 decision, Board allowing discharged employee's grievance and remaining seized with respect to compensation - Grievor's counsel requesting that Board reconvene to determine amount of compensation owing - Board noting that only the union and employer have standing on a section 124 application (subject to possible exceptions not relevant in this case) - Board dismissing grievor's request

BEFORE: Michael Bendel, Vice-Chair, and Board Members W. N. Fraser and B. L. Armstrong.

APPEARANCES: Harold F. Caley and Dory Smith for the applicant; Bruce W. Binning and Paul Richer for the respondent; David Jones for the grievor.

DECISION OF THE BOARD; December 19, 1991

- 1. This is a referral of a grievance to the Board under section 124 of the *Labour Relations* Act.
- 2. The grievance relates to the respondent's termination of the employment of Mr. Eric Williams ("the grievor") in October 1987. In a decision dated April 14, 1988, this panel of the Board decided (with Mr. Fraser dissenting) to allow the grievance. Paragraph 25 of the decision reads as follows:
 - 25. The grievor is therefore entitled to a remedy for the discharge without just cause that he suffered. We order that he be re-instated in employment with full compensation for lost pay and benefits. We will remain seized of this matter in the event that the parties are unable to agree on the amount of compensation due to the grievor.
- 3. By letters dated July 29 and October 25, 1991, Mr. Jones, counsel for the grievor, requested the Board to reconvene to determine the amount of compensation to which the grievor was entitled.
- 4. In accordance with this request, the Board held a new hearing. At the hearing, counsel for the applicant noted that the referral of this matter back to the Board had been made by counsel for the grievor, and not by or on behalf of the applicant. The applicant, he stated, took the position that it was not appropriate to bring this matter back before the Board. Counsel for the respondent objected to this matter being brought back before the Board by the grievor. The legislation and the case-law, he argued, established that the parties to a grievance were the union and the

employer. It was only in exceptional circumstances, according to counsel, that a grievor has standing as a party in a grievance arbitration. Where the Board has remained seized of an application for the purpose of deciding the amount of compensation due, only a party can bring the matter back on for hearing before the Board.

5. After hearing counsel, the Board gave an oral decision dismissing the grievor's request that the Board determine the amount of compensation due to him. In the Board's view, only the union and the employer have standing on a section 124 application (subject to possible exceptions that are not relevant here). It is not open to the grievor in this case to seek a ruling from the Board on the quantum of the compensation to which he is entitled.

2544-90-R Mrs. Violet Martin, Applicant v. Cement, Lime, Gypsum and Allied Workers Division of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 576, Respondent v. **Hamilton Automatic Vending Company Limited,** Intervener

Bargaining Unit - Employee - Termination - Board finding disputed individuals to be employees within meaning of the Act - Union not estopped from claiming employees included in bargaining unit - Lack of dues deduction not determinative of employee status - Disputed individuals found to be employees in bargaining unit for purpose of determining whether 45 per cent of employees in bargaining unit signed petition

BEFORE: Judith McCormack, Vice-Chair, and Board Members W. H. Wightman and H. Peacock.

APPEARANCES: David Borwick for the applicant; Cindy D. Watson, Judy Rosastik and Zelma Cochrane for the respondent; James G. Knight and Patricia Sanderson for the intervener.

DECISION OF THE BOARD; December 16, 1991

- 1. This is an application under section 57 of the *Labour Relations Act* for a declaration terminating the respondent's bargaining rights. The parties met initially with a Board officer and were able to settle a number of issues between them which were addressed in a decision of the Board dated January 31st, 1991. At that time, the parties remained in dispute with respect to whether four individuals were in the bargaining unit. A Board officer was appointed to inquire into and report back to the Board with respect to whether three of them exercised managerial functions and whether the fourth was a full-time employee.
- 2. Accordingly, a Board officer met with the parties and conducted an examination into the duties and responsibilities of Margaret Stronach, Tracy Degazio and Ron Park. In the course of this process, the parties reached agreement that Donna Hill was an employee within the bargaining unit. The matter then came back on before this panel to address any outstanding issues.
- 3. Those issues may be described as follows:
 - (1) The issue of whether Margaret Stronach, Tracy Degazio and Ron Park are included within the bargaining unit.

- (2) An allegation filed by the respondent to the effect that prior to the Board officer examination, the intervener employer threatened Ron Park that unless he gave evidence to suggest that he should be excluded from the bargaining unit, his position would be in jeopardy.
- (3) The issue of the voluntariness of the petition. In this regard, the respondent relies upon a number of previous findings by the Board that the intervener employer engaged in unfair labour practices (Board Files 0577-88-U and 1908-88-U), together with subsequent litigation (Board Files 0785-89-U, 0176-90-U, 0083-88-R, 0158-88-R, 1066-88-R, 0729-88-U and 1602-88-U).
- 4. At the outset of the hearing, the Board dealt with a number of preliminary matters, including the order in which the outstanding issues would be addressed. All parties agreed that the voluntariness of the petition should be dealt with after the first two issues. Neither the intervener nor the respondent had witnesses available with respect to the allegation regarding Ron Park, the respondent having been unsuccessful in attempting to serve a subpoena and the intervener having received late notice of the allegation. As a result, the Board decided that it would proceed to hear the parties' submissions with respect to the first issue of the exclusion of the three disputed individuals from the bargaining unit. It was anticipated that this would occupy the balance of the day. Further days of hearing would then be set for the remaining issues. In the meantime, since the first issue affected the count on the termination application, if we were in a position to render an interim decision on that issue which would be of assistance to the parties, we told the parties that we would attempt to do so. This is such an interim decision. Because of the outstanding allegation involving Ron Park, we address ourselves here only to the evidence and submissions with respect to Margaret Stronach and Tracy Degazio.
- 5. Briefly, the applicant and the intervener assert that Margaret Stronach and Tracy Degazio exercise managerial functions and are excluded from the bargaining unit for that reason. They also argue that these two individuals have not paid dues and have not been represented by the respondent until now, and the respondent is therefore estopped at this point from claiming otherwise. Even if an estoppel is not made out, they argue that the Board should consider evidence in this regard as determinative of whether these individuals are in the bargaining unit.
- 6. The respondent argues that neither Ms. Stronach and Ms. Degazio exercise managerial functions, that they are covered by the scope clause in the collective agreement, and that the union has been actively attempting to identify individuals within the bargaining unit and collect dues from them for some time, but has been foiled by the intervener's lack of co-operation.
- 7. Section 57(3) provides as follows:
 - 57.-(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as it determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.
- 8. We observe at the outset that section 57(3) requires us to ascertain the number of employees in the bargaining unit and determine a percentage based on that figure. As a result, it is necessary for us to decide whether the disputed individuals are actually in the bargaining unit, and not just whether they exercise managerial functions, although the latter will undoubtedly form a

part of the former decision. If they do exercise managerial functions, they cannot be included within the bargaining unit since they do not fall within the definition of "employee" contained in section 1(3)(b) of the *Labour Relations Act*. However, if Ms. Stronach and Ms. Degazio do not exercise managerial functions, we must then address the arguments of the applicant and the intervener directed at their exclusion for other reasons.

- 9. Turning first to the issue of whether they exercise managerial functions, the Board has set out its approach to managerial exclusions in a number of cases, including *Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121 in which it said as follows:
 - 3. The Labour Relations Act does not contain a definition of the term "managerial function", nor are there any specified criteria to guide the Board in reaching its opinion. The task of developing such criteria has fallen to the Board itself, and in recognition of the fact that the exercise of managerial functions can assume different forms in different work settings, the Board has, over the years, evolved various general approaches to assist it in its inquiry. In the case of so called "first line" managerial employees, the important question is the extent to which they make decisions which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is incompatible with participation in trade union activities as an ordinary member of the bargaining unit. In the case of more senior managerial personnel whose decision-making may have a less direct or immediate impact on bargaining unit employees, the Board has focused on the degree of independent decision-making authority over important aspects of the employer's business. It is evident that persons making significant executive or business decisions should be considered a part of the "management team" even though they do not exercise the kind of direct authority over employees which is characteristic of a first line foreman
 - 4. The line between "employee" and "management" is often shaded, and while it is helpful to consider the principles articulated by the Board in previous cases, ultimately the determination must turn on the facts of the particular case. There is no litmus test which is universally applicable and dictates the results in every situation, and in assessing each case, the Board must have due regard to the nature of industry, the nature of the particular business, and individual employer's organizational scheme. There must, of course, be a rational relationship between the number of superiors and subordinates, consultation or "input" should not be confused with decision-making, and neither technical expertise nor the importance of an employee's function can be automatically equated with managerial status. On the other hand, there may be individuals whose nominal authority appears to be limited, and who have no formal managerial position or title, but who nevertheless make recommendations affecting the economic destiny of their fellow employees which are so frequently forthcoming, and consistently followed by superiors, that it can be said that, in fact, the effective decision is made by the challenged individual. It is this type of recommendation which the Board has characterized as an "effective recommendation" and the inclusion of these persons in the bargaining unit would raise the very kind of conflict of interest which section 1(3)(b) was designed to avoid. Persons making "effective recommendations" of this kind are regarded as part of the "management team", and are excluded from the bargaining unit.
 - 5. In each instance, the Board seeks to determine the nature and extent of the individual's authority as well as the extent to which that authority is actually exercised. It is not sufficient if an individual has only "paper powers" contained in a job description or a "managerial" job title, if managerial functions are not actually exercised. Even the performance of certain co-ordinating functions may not be determinative. Where numbers of people work at a common enterprise (especially in the white collar service sector) many persons may be engaged in co-ordinating activities which are largely routine, carried out within a pre-established framework of rules and policies, and subject to real managerial authority which is actually exercised from above. In addition, persons who perform technical functions or exercise craft skills which have been acquired through years of training and experience, will necessarily have a considerable influence over unskilled employees or less experienced "journeymen" or technicians. These experienced personnel will commonly supervise the work of those who are less experienced, and

it is part of their normal job function to train and direct such persons and to instill good work habits. Often, it is only the most senior or skilled employees who will fully understand the technical requirements of the job and the tools and material required, and accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. In such circumstances, it is inevitable that they will have a special place on the "team" and will have a role to play in co-ordinating and directing the work of other employees; but this does not mean that they exercise managerial functions in the sense contemplated by section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining - especially when most of their time is spent performing functions similar to those of other individuals in the bargaining unit and there is little or no evidence of the kind of conflict which section 1(3)(b) is designed to avoid.

- With this in mind, we now turn to the specific facts before us. We note firstly that Ms. Stronach is described as the manager of the cafeteria at the Firestone building. Her job duties involve preparing coffee and food, serving customers, operating the cash register and providing coffee service in the building. Donna Hill, whom the applicant and the intervener assert Ms. Stronach supervises, arrives at 10:00 or 11:00 a.m. when work gets busier, and serves customers while Ms. Stronach continues to operate the cash register. Ms. Hill usually leaves work at approximately 2:00 p.m., and Ms. Stronach then washes up, including washing the floor. Occasionally Ms. Hill will be the one to wash the floor.
- Tracy Degazio described herself as a catering specialist and indicated that the main part of her job was to order business lunches, cater to business meetings, and provide coffee service. She also services vending machines, makes coffee and delivers it to customers. According to Ms. Degazio, there is only one person under her direction, and that is Margaret Stronach. When asked how she supervised Ms. Stronach, she told the examiner that she was available if Ms. Stronach needed help. She said that she did not control the latter's work, nor did she check, inspect or correct it. She does let Ms. Stronach and Ms. Hill know how the work is going and how customers are relating to the service. Ms. Degazio is only in the Firestone building where Ms. Stronach works at intervals throughout the day amounting to a total of between ten and thirty minutes.
- We do not find it necessary to recite every detail of the evidence contained in the examiner's report. Suffice it to say that there is some overlap in the evidence between Ms. Stronach and Ms. Degazio, and a number of inconsistencies. Where there are conflicts, we have accepted Ms. Stronach's evidence of her own duties and Ms. Degazio's evidence of her respective duties as most likely to be reliable. Having carefully reviewed that evidence, we have serious doubts that either exercise managerial functions.
- Both spend the vast majority of their working days on duties which could not be considered managerial by any stretch of the imagination. Although each has some limited authority with respect to minor matters, neither exercises any significant supervisory control over the one employee each claims to supervise, that is, Ms. Hill in Ms. Stronach's case, and Ms. Stronach in Ms. Degazio's case. Neither can recommend wage increases or promotions, or formally discipline employees. Having regard to the inconsistencies in their evidence in this regard, we find their respective claims to involvement in the hiring and firing process to be somewhat inflated. However, even if we take their evidence at face value, that involvement related primarily, if not exclusively, to persons outside the bargaining unit such as students and part-time employees, or to persons employed by other companies such as agency employees. In these circumstances, the mischief in terms of conflict of interest to which the managerial exclusion is in part directed is minimized.
- 14. In addition, their role in this process would form a minute proportion of their overall job duties. In circumstances where employees perform a mix of supervisory and bargaining unit duties, the Board said in *Falconbridge Nickel Mines Ltd.*, [1966] OLRB Rep. Sept. 379 that an

individual will be considered managerial only if she or he is primarily engaged in supervision and direction of other employees, and not if those duties are merely incidental to the prime purpose for which he or she was engaged:

Most of the persons in dispute have more than one function and generally speaking it is the weight or emphasis attached to the different functions which must determine on which side of the managerial line the persons fall. Senior or skilled employees often have more responsibilities than other rank and file employees and they exercise certain control and direction over the other employees because of their greater experience and skill. It is the Board's difficult task to determine whether the additional responsibilities are managerial functions within the meaning of section 1(3)(b) of the Act or are merely incidental to the prime purpose for which the employee is engaged (i.e., to perform work properly performed by persons within the bargaining unit). If the majority of a person's time is occupied by work similar to that performed by employees within the bargaining unit and such person has no effective control or authority over the employees in the bargaining unit but is merely a conduit carrying orders or instructions from management to the employees, the person cannot be said to exercise managerial functions within the meaning of section 1(3)(b) of the Act. On the other hand, if a person is primarily engaged in supervision and direction of other employees and has effective control over their employment relationship, even though the person occasionally performs work similar to the rank and file employees when an emergency arises or to relieve an employee during occasional periods of absence or even to perform a particularly important job requiring special skill and experience, such occasional work in no way derogates from his prime function as a person employed in a managerial capacity. When assessing a person's duties and responsibilities the Board does not look at any one function in isolation but views all functions in their entirety. As stated in the McDougall case above referred to, titles alone are not much assistance in determining what a person's functions really are.

15. We note as well that if the position of the applicant and the intervener were accepted, the result would be a management to employee ratio of two management representatives to one employee for the Firestone operation. As the Board observed in the *Corporation of the City of Thunder Bay*, *supra*, if an individual has only a small number of subordinates, his or her managerial status is unlikely to be affirmed unless there is very clear evidence pointing to the mischief to which section 1(3)(b) is directed:

Finally, again from a practical point of view, if the new purported "manager" has only a small number of subordinates, his managerial status is unlikely to be affirmed unless, as between them, there is very clear evidence, that the duties exercised are of such character that they clearly demonstrate the mischief to which section 1(3)(b) is directed. The fewer the number of subordinates, the stronger the need for demonstrative evidence of managerial status - especially if the next level of management is in close proximity and seems to be closely involved in the ultimate decision making.

Looking at the evidence as a whole, we conclude that Ms. Stronach and Ms. Degazio are employees within the meaning of the *Labour Relations Act*.

As a result, we turn to the issue of whether these employees are excluded from the bargaining unit for other reasons. The estoppel asserted by the applicant and the intervener is subject to some serious deficiencies. For an estoppel to arise, a contracting party must have led another by words or conduct to believe that the former will not insist on his or her strict legal rights, knowing or intending that the other will act on that belief, and the other must so act to his or her detriment (*Crabb v. Arun District Council*, [1975] 3 All E.R. 865). We accept that the intervener has not been deducting dues for either Ms. Stronach or Ms. Degazio, and that no grievances have been filed in this regard, facts which would normally be highly significant. In this case, however, there was no dispute that employees work in a number of different locations, and the intervener acknowledged that one of the concerns expressed by the respondent over some period of time and with some persistence was the identification of employees in the bargaining unit and the deduction

of dues. Indeed, the respondent filed a section 89 complaint which included this problem as one of its subjects. Ms. Stronach and Ms. Degazio were specifically named in this complaint, which was eventually adjourned *sine die* and is still pending.

- Counsel for the intervener concedes that at the time of the two previous unfair labour practice decisions (Board Files 0577-88-U and 1908-91-U issued February 8, 1989 and March 2, 1989 respectively), labour relations were at a low point between the intervener and the respondent. After he became involved in the situation, the respondent and the intervener were able to conclude a collective agreement in May of 1989, and in October of 1989, a number of outstanding matters relating to section 89 complaints were settled. It is after this point that he asserts that an estoppel arises. It should be noted that the respondent maintains that it continued to press its concerns about dues deductions after October of 1989. However, we are prepared to assume, without finding, for the purposes of this decision that there was some hiatus in the union's activities in this regard between October of 1989 and April of 1990. There is no dispute that the section 89 complaint with respect to Ms. Stronach and Ms. Degazio was filed on April 18, 1990, and adjourned sine die on October 30, 1990. To round out the chronology, this application was filed on January 11, 1991.
- 18. In these circumstances, it is difficult to conclude that the respondent led the intervener to believe that Ms. Stronach or Ms. Degazio were excluded from the bargaining unit, either by words or conduct. The fact that no grievances were filed is overshadowed by the section 89 complaint which would have left the intervener in no doubt as to the respondent's views. Moreover, we do not think that the brief period from October of 1989 to April of 1990, occurring mid-contract as it does, could have misled the intervener before the section 89 complaint was filed, particularly in light of the fact that Ms. Degazio was not hired until the summer of 1989 and Ms. Stronach was not made a manager until December of that year. Indeed, the Firestone location was a new operation, and it is not clear that the respondent was even aware of employment of Ms. Degazio and Ms. Stronach during the period in question, let alone that it acquiesced in the non-deduction of dues.
- 19. Counsel for the applicant contends that his client is at a disadvantage because she would assume that Ms. Stronach and Ms. Degazio were excluded from the bargaining unit and that therefore she could not approach them to sign the petition. If the Board was to find now that these individuals were in the unit, this would change the numbers required to mount a successful termination application. We are not unsympathetic to this argument, although we note that there is no evidence that the applicant in fact conducted herself in this manner, or that she was aware of which employees for whom the intervener was deducting dues. Nevertheless, it is a common problem for applicants, particularly in certification applications, to find that the parameters of the bargaining unit have changed in the course of litigation with undesirable effects on their applications. Of course, in termination applications one expects that those parameters will be more firmly established. In the circumstances before us, however, it is evident that the difficulties that the parties have experienced in stabilizing their collective bargaining relationship have meant that this is not the case. If it is possible for the applicant to invoke an estoppel in this situation, which we doubt, we conclude similarly that the respondent made no representation which might have misled her.
- 20. The applicant argues that the union should have pursued the section 89 complaint adjourned on October 30, 1990 more vigorously. The respondent replies that the complaint concerned a number of subjects and that settlement discussions were in progress. Having regard to the delicacy of settlement negotiations generally, the ambiguous nature of an adjournment in these circumstances and the background of litigation between the intervener and the respondent, we would be loathe to conclude that the fact that the complaint was adjourned is particularly significant one way or another. Certainly, there is no suggestion that the portion of it involving Ms. Stronach and

Ms. Degazio was settled, or that any representations to the effect that the respondent was dropping its claim in this regard were made at that time. We conclude that there was no representation by words or conduct which would have led either the applicant or the intervener to believe that the respondent would not be insisting on its legal rights with respect to Ms. Stronach and Ms. Degazio. As a result, the estoppel cannot be maintained.

- The other arguments advanced by the intervener and to some extent by the applicant are that the respondent's position amounts to gerrymandering the unit, and that the respondent has not sought to represent Ms. Stronach and Ms. Degazio in the past, which should be determinative of their status at this point. In light of the section 89 complaint involving Ms. Stronach and Ms. Degazio, which was filed some eight months before the termination application, and the various acknowledgements made by the intervener, we do not think it can be said either that the respondent is gerrymandering in the usual sense of the word, or that the respondent has not sought to represent the disputed individuals.
- The proposition that the lack of dues deductions and grievances should be determinative of the status of Ms. Stronach and Ms. Degazio even in the absence of an estoppel is a little difficult to pin down legally. We presume that this is a reference to interpreting the scope clause contained in the collective agreement based on past practice. If this is so, we note that this argument is subject to some of the same infirmities attendant on the estoppel position advanced by the intervener and the applicant. There are certain requirements for the past practice between parties to be a useful aid in interpretation which are set out, among other places, in *John Bertram & Sons Co. Ltd.*, (1978) 18 L.A.C. 362 in the following manner:

Hence it would seem preferable to place strict limitations on the use of past practice in our second sense of the term. I would suggest that there should be (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context; (2) conduct by one party which unambiguously is based on one meaning attributed to the relevant provision; (3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection; (4) evidence that members of the union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice.

23. The scope clause of the relevant collective agreement reads as follows:

The company recognizes the union as the exclusive bargaining agent of all of its employees working in and out of Hamilton plant at 377 Gage Avenue North, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students hired for vacation periods.

Neither catering specialists or managers are specifically excluded, and at first glance, it is not apparent that a catering specialist such as Ms. Degazio is either a supervisor or someone above the rank of supervisor. On the other hand, on the face of the provision it would not be unreasonable to consider a person described as a manager such as Ms. Stronach to be either a supervisor or above. The problem is that the intervener asserts that Ms. Degazio is superior to Ms. Stronach, so that the inclusion of the former and the exclusion of the latter on the basis of this language leads to a non-sensical result. In addition, it is difficult to avoid the conclusion that the supervisory cutoff was based at least in part, if not entirely, on the proposition that these people exercise managerial functions, a proposition that is not the case with respect to either Ms. Degazio or Ms. Stronach. As a result, there is at least some latent ambiguity in applying this provision in the circumstances before us which would invite extrinsic interpretative aids.

24. The problem is that the limited evidence we have in this regard is not particularly helpful. There is no doubt that the intervener's decision not to deduct dues is a clear indication of its views on the subject. However, even if we assume that there was a period of time during which the failure to deduct dues was unchallenged, it is relatively short and is situated between two periods of time during which the respondent was actively pursuing this issue. The intervener's unilateral decision not to deduct dues without clear and affirmative evidence that the respondent knowingly acquiesced in that decision prior to the section 89 complaint being filed does not reveal the kind of mutual intention on the part of the contracting parties which can be used to interpret an ambiguous collective agreement provision.

- 25. This means that we must return to the wording of the scope clause itself and attempt to apply it to the circumstances before us in a manner that makes some practical labour relations sense. With this in mind, we observe firstly that the clause is an "all employee" provision with specific exclusions which as we noted previously, do not expressly refer to either the classification of catering specialist or manager. If they are not supervisors, or above the rank of supervisor then they must be included in the unit on the basis of this language. We have already concluded that they do not exercise managerial functions, and expressed the view that it is likely there is some common sense corollary between the managerial exclusion in the Act and the supervisory exclusion in the collective agreement. Even without that corollary, however, we do not think that on the evidence before us it can be said that either Ms. Stronach or Ms. Degazio hold the rank of supervisor or above, for the simple reason that they do not wield any meaningful supervisory powers. We do not think that in Ms. Stronach's case, her title can carry much weight in the face of our finding as to what she actually does, and the undisputed assertion that she is subordinate to Ms. Degazio in the intervener's hierarchy.
- 26. If the argument advanced in this regard is a more general appeal to fairness rather than a reference to past practice or as aid to interpretation, we do not think that the equities in this situation are so unevenly distributed as to prompt us to invoke some curative power, even supposing we had such jurisdiction. Nor do we think it would be appropriate as a remedy to deprive two individuals of the opportunity to participate in a collective bargaining regime.
- 27. As a result, we conclude that Ms. Stronach and Ms. Degazio are employees within the bargaining unit.
- 28. The effect of our conclusion in this regard is to throw into doubt the continued viability of the application, since the applicant does not have names on the petition representing not less than forty-five per cent of employees in the bargaining unit. Any submissions the parties wish to make with respect to the appropriate procedure at this point must be made in writing within ten days of the date of this decision. Otherwise the Board may dispose of the application on the basis of the material presently before it.

3222-90-U; 3223-90-U The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and the Electrical Contractors Association of Toronto, Complainants v. The International Brotherhood of Electrical Workers, Local 353, Joe Fashion, Bob Gill & Bill Martindale and others, Respondents

Construction Industry - Practice and Procedure - Strike - Unfair Labour Practice - Employer bargaining agency alleging various unfair labour practices and seeking Direction regarding an unlawful strike - Board finding complainants without status to make allegations regarding sections 70 and 78 of the *Act*, and that no *prima facie* case made out with respect to other allegations - Board indicating that it would have deferred the complaints to the arbitration process in any event

- Complaints dismissed

BEFORE: Ken Petryshen, Vice-Chair, and Board Members W. N. Fraser and J. Redshaw.

APPEARANCES: Scott G. Thompson, Eryl Roberts and Tim English for the complainants; A. M. Minsky, P. Trudene and Joe Fashion for the respondents.

DECISION OF THE BOARD; December 9, 1991

- 1. The Board has before it a section 89 complaint and a complaint under section 135 of the Labour Relations Act. In their section 89 complaint, The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and the Electrical Contractors Association of Toronto allege that the International Brotherhood of Electrical Workers, Local 353 ("Local 353"), Joe Fashion, Bob Gill and Bill Martindale have contravened sections 70, 74, 76, 78 and 146 of the Act. The complainants rely on the identical particulars in the section 89 complaint to support their complaint under section 135 of the Act. This latter application is designed to remedy the respondents' alleged unlawful strike conduct.
- 2. At the first day of hearing, the Board entertained submissions on motions made by counsel for the respondents. Counsel argued that the Board should not hear the merits of the two matters for three reasons. Counsel argued that the application and complaint do not make out a prima facie case for the remedy requested, that they both lack adequate particulars and should be dismissed and that the essence of both complaints is a contractual dispute between the parties which should be deferred to the arbitration process.
- 3. In dealing with the motions, the Board has accepted as true the particulars filed with the complaints. Those particulars are as follows:
 - 1. The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario ("ETBA") is the designated employers' bargaining agency which was designated by the Minister of Labour on December 12, 1977 under section 127(1)(b) [now 139(1)(b)] to represent in bargaining in the industrial, commercial and institutional sector of the construction industry all employers whose employees are represented by the International Brotherhood of Electrical Workers, the IBEW Construction Council of Ontario ("IBEW/IBEW-CCO") and the various affiliated bargaining agents including IBEW, Local 353 (the "Local Union").
 - 2. The Electrical Contractors Association of Toronto ("ECAT") is both a constituent member of the ETBA which represents its employer members in the ICI sector as well as an accredited employers organization representing employers whose employees are represented by IBEW Local 353 in the residential sector of the construction industry for Board Area 8.
 - 3. The Local Union is an affiliated bargaining agent affiliated to the IBEW/IBEW-CCO which is the employee bargaining agent which was designated by the Minister of Labour on December

- 12, 1977 under section 127(1)(a) [now 139(1)(a)] to represent in bargaining in the industrial, commercial and institutional sector of the construction industry all Journeymen and Apprentice Electricians and Journeymen and Apprentice Linemen represented by the affiliated locals of the IBEW.
- 4. The ETBA as well as the employers it represents, the IBEW/IBEW-CCO and the Local Union as well as the employees they represent are bound by a provincial agreement between the ETBA and the IBEW/IBEW-CCO which expires April 30, 1992 (the "Principal Agreement"). ECAT and the Local Union are also bound by the relevant provisions of the Principal Agreement with respect to the residential sector in Board Areas 8.
- 5. On or about the week of February 25, 1991 it came to the attention of the ETBA and ECAT that when contractors requested a name hired foreman from the Local Union pursuant to Section 700 of the Principal Agreement, the Local Union is asking the contractor to sign a declaration, a copy of which is attached as schedule "1" (the "Contractor's Declaration"). The Contractor's Declaration is as follows:

DECLARATION

(Name of Company)

ACKNOWLEDGES THAT:

1. THEY HAVE REQUESTED LOCAL 353, IBEW TO DISPATCH

(Name of Member)

TO WORK AS A NAME HIRE FOREMAN TO THE TERMS OF THE COLLECTIVE AGREEMENT.

2. UPON THE DEMOTION OF

(Name of Member)

FROM THE POSITION OF FOREMAN, HIS EMPLOYMENT WITH THE COMPANY WILL BE TERMINATED IMMEDIATELY.

3. THE COMPANY FURTHER ACKNOWLEDGES THAT IF IT FAILS TO COMPLY WITH THIS DECLARATION IT WILL BE IN BREACH OF THE COLLECTIVE AGREEMENT AND LOCAL 353 RESERVES THE RIGHT TO PURSUE SUCH BREACH AT THE ONTARIO LABOUR RELATIONS BOARD.

DATED AT THIS DAY OF , 19

SIGNATURE - ON BEHALF OF THE COMPANY

6. At the same time it came to the attention of the ETBA and ECAT that the Local Union is forcing its members, who are name hired as foremen pursuant to Section 700 of the Principal Agreement to sign a document, a blacked out sample of which is attached as Schedule "2" (the "Member's Declaration"). The Member's Declaration is as follows:

DECLARATION OF NAME HIRE FOREMAN

ACKNOWLEDGE THAT:

- 2. AS A NAME HIRE FOREMAN I AGREE I DO NOT WORK WITH THE TOOLS AND I WILL NOT TAKE A TRANSFER FROM THE ASSIGNED JOB SITE.
- 3. THE WORKING RULES AND REGULATIONS OF LOCAL 353 IBEW STATE THAT UPON MY DEMOTION FROM THE POSITION, I MUST FORTHWITH RETURN TO THE OUT OF WORK LIST AT THE OFFICE OF LOCAL 353, IBEW.
- 4. IF I FAIL TO CEASE EMPLOYMENT WITH ______(Name of Company)

UPON MY DEMOTION FROM THE POSITION OF FOREMAN, I UNDERSTAND THAT LOCAL 353 RESERVES THE RIGHT TO LAY CHARGES AGAINST ME PURSUANT TO THE CONSTITUTION OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, IF I FAIL TO SIGN THE OUT OF WORK LIST.

DATED AT THIS DAY OF , 19 .

WITNESS

- 7. In response the ETBA and ECAT sent a letter to the Local Union, a copy of which is attached as Schedule "3", asking the Local Union to cease and desist this practice immediately. (It is unnecessary to reproduce this letter.)
- 8. It is the position of the ETBA and ECAT that the Local Union, as well as its officers, officials and agents, through this Member's Declaration is directing name hired foremen to breach the Principal Agreement by directing them not to work with the tools, by directing them not to take a transfer from the assigned job site and by directing them to return to the out of work list upon being demoted from the position of foremen. In addition the Local Union, as well as its officers, officials and agents, is intimidating and coercing the name hired foremen into signing the declaration and counselling, supporting and encouraging them to breach the Principal Agreement by threatening to lay charges against the name hired foremen, as members of the Local Union, if they fail to comply with the coerced Member's Declaration and breach the Principal Agreement as directed by the Local Union.
- 9. It is the position of the ETBA and ECAT that this conduct contravenes Section 70 of the *Labour Relations Act*, R.S.O. 1980, c. 228 in so far as the Local Union, as well as its officers, officials and agents, through this conduct is seeking by intimidation and coercion to compel the name hired foremen, who are employees covered by the Principal Agreement and represented by the Local Union, to refrain from exercising their rights and from performing their obligations under the Principal Agreement and the *Labour Relations Act*, R.S.O. 1980, c. 228.
- 10. It is the position of the ETBA and ECAT that this conduct also contravenes Section 74 of the *Labour Relations Act*, R.S.O. 1980, c. 228 in so far as the Local Union, as well as its officers, officials and agents, have through this conduct called or authorized or threatened to call or authorize an unlawful strike or have counselled, procured, supported or encouraged an unlawful strike or threatened an unlawful strike.

- 11. It is the position of the ETBA and ECAT that this conduct also contravenes Section 76 of the *Labour Relations Act*, R.S.O. 1980, c. 228 in so far as the Local Union, as well as its officers, officials and agents, through this conduct have done acts they know or ought to know that, as a reasonable and probable consequence of those acts, the name hired foremen will engage in unlawful strikes.
- 12. It is the position of the ETBA and ECAT that this conduct also contravenes Section 78 of the *Labour Relations Act*, R.S.O. 1980, c. 228 in so far as the Local Union, as well as its officers, officials and agents, through this conduct have indicated their intent to suspend, expel or penalize name hired foremen if they refuse to engage in or to continue to engage in strikes that would be unlawful under the *Labour Relations Act*, R.S.O. 1980, c. 228.
- 13. It is the position of the ETBA and ECAT that this conduct also contravenes Section 146 of the *Labour Relations Act*, R.S.O. 1980, c. 228 in so far as the Local Union, as well as its officers, officials and agents, through this conduct have bargained for or attempted to bargain for or conclude a collective agreement or other arrangement affecting employees represented by the Local Union as an affiliated bargaining agent other than the Principal Agreement.
- 4. The complainants request the Board to make the following directions and orders:
 - a) The Complainants request the Board to direct and order the Respondents to cease and desist from engaging in any conduct that contravenes sections 70, 74, 76, 78, or 146 of the *Labour Relations Act*, R.S.O. 1980, c. 228.
 - b) The Complainants request the Board to direct and order the Respondents to cease and desist from requiring their members who are name hired foremen to sign the Member's Declaration and to cease and desist from asking contractors to sign the Contractor's Declaration.
 - c) The Complainants request the Board to direct and order the Respondents to post a notice and mail a copy to all affected persons acknowledging their breaches of the *Labour Relations Act*, R.S.O. 1980, c. 228 and confirming their intention to cease and desist from similar breaches in the future.
 - d) The Complainants request the Board to direct and order that any executed Member's Declarations or Contractor's Declarations are null and void.
 - e) The Complainants request the Board to direct and order the Respondents to cease and desist from bargaining for, attempting to bargain for or concluding any similar arrangements that differ from or undermine the provisions of the Provincial Agreement in the future.
 - f) The Complainants request the Board to direct and order the Respondents to compensate all contractors and name hired foremen who may have suffered damages, including interest, as a result of the Respondents' conduct.
 - g) Such further and other relief as may be appropriate in the circumstances.
- 5. Section 700 of the Provincial Agreement portion of the Principal Agreement provides that:

700 HIRING

The Contractor agrees to hire and employ only members of the International Brotherhood of Electrical Workers on all electrical work. The Contractor shall have the right to select and name-hire all Foremen. When making appointments to the Foreman level, the Employers will give consideration to those Journeymen they presently employ. All hiring will be done through the Local Union Office and no one will be employed unless they are in possession of a clearance card from the Local Union Office.

6. The Board does not propose to set out counsel's submissions in detail. Counsel for the complainants took the position that both complaints disclose a *prima facie* case for the relief

requested and submitted that the Board should entertain both matters. The essence of the complainants' position is that the declarations on their own constitute a contravention of Section 700 of the Provincial Agreement. The complainants submit that the conduct of the respondents has resulted in an "other arrangement" within the meaning of section 146(2) of the Act. By threatening to lay charges under its Constitution against the name-hired foremen, as members of Local 353, the complainants argue that the respondents contravene section 70 of the Act when they attempt to compel Local 353 members to execute the members' declaration and allegedly breach the Principal Agreement. With respect to the alleged contraventions of sections 74, 76, 78 and 135 of the Act, the complainants argue that the effect of the respondents' conduct constitutes at least a threat of an unlawful strike since members acting as name-hired foremen could engage in conduct which would constitute a strike.

- 7. As noted earlier, counsel for the respondents takes the position that the complaints do not disclose a *prima facie* case. Concerning the alleged breach of section 70, counsel submitted that the complainants have no status to obtain a remedy on behalf of members of Local 353. Alternatively, counsel submitted that even if the complainants did have status, they did not plead any facts concerning the purpose and conduct elements of section 70 from which one could conclude a *prima facie* case has been made out. With regard to the illegal strike allegations, counsel asserted that the complainants have not pleaded any facts to support the alleged contraventions of sections 74, 76, 78 and 135 of the Act. Counsel notes as well that the complainants have no status to seek a remedy for the alleged section 78 contravention. Counsel submits that the complainants' allegations that the respondents have contravened section 146(2) of the Act is misconceived. This is not a situation, he argues, where an attempt is being made to circumvent the provisions of a provincial agreement. Rather, he suggests that the respondents are attempting to enforce Section 700 of the Agreement and that the essence of the dispute between the parties centres on the interpretation of Section 700. This is why, as well, counsel maintains in the alternative that the complaints should be deferred to the arbitration process.
- The positions advanced by counsel for the respondents have considerable merit. The complainants do not have status to complain on behalf of members of Local 353 concerning the sections 70 and 78 allegations. If Local 353 members have concerns about the conduct of the respondents, it is up to them to complain. See, Rexdale Heating Limited, [1974] OLRB Rep. March 115 and Re: C.L.R.B. and Transair Ltd., (1976), 67 D.L.R. (3d) 421 (S.C.C.). In any event, the facts pleaded by the complainants do not disclose a prima facie case for the remedy requested with respect to the section 70 allegation. The Board has reached the same conclusion concerning the allegations made in support of a contravention of sections 74, 76, 78 and 135 of the Act. The complainants have not pleaded facts, which, if true, would lead the Board to conclude that illegal strike activity has occurred or had been threatened having regard to the definition of "strike" in the Act. In response to a question about where in the pleadings is there the assertion that two employees refused to work in concert, counsel for the complainants responded that when all the evidence is before the Board, the facts may reveal a contravention of the strike provisions. In other words, counsel was unaware of circumstances where two name-hired foremen employed by the same contractor refused to work in concert. The complainants are merely speculating that such circumstances might exist and are not in a position to assert that they do. Therefore, the Board finds that the complaint under section 135 of the Act does not disclose a prima facie case for the remedy requested and accordingly, dismisses the complaint in Board File No. 3222-90-U. The Board also finds that the section 89 complaint in Board File No. 3223-90-U does not disclose a prima facie case for the remedy requested with respect to the allegations that the respondents contravened sections 70, 74, 76 and 78 of the Act and accordingly, the complaint is dismissed with respect to those allegations.

- Even if the Board had determined that a prima facie case had been made out with 9. respect to the above allegations, it would nonetheless have refused to hear the complaints and would have deferred them to the arbitration process. As the submissions of counsel for the complainants disclose, the complainants' positions are based on their conclusion that the respondents are violating Section 700 of the Collective Agreement. The same can be said with respect to the complainants' position in the section 146(2) allegation. Armed with their interpretation of Section 700, the complainants argue that the respondents are engaging in conduct with contractors which constitutes an "other arrangement". Believing that their interpretation of Section 700 is the correct one, the respondents take the position that they are simply attempting to ensure that their members and contractors comply with the provision. The Board agrees that the dispute between the parties is essentially a contractual dispute concerning the interpretation of Section 700 of the Collective Agreement. In the Board's view, the situation before us is factually distinct from the circumstances before the Board in C.F. Lummus Canada Ltd., [1983] OLRB Rep. Sept. 1504. After considering the nature of the section 146(2) allegation, the Board finds it appropriate to exercise its discretion to defer that aspect of the section 89 complaint to the arbitration process.
- 10. Accordingly, the section 89 complaint in Board File No. 3223-90-U and the section 135 complaint in Board File No. 3222-90-U are hereby dismissed.

0768-90-U John Kohut, Complainant v. The National Automobile, Aerospace and Agricultural Implement Workers' Union of Canada (C.A.W.-Canada) and its Local 303, Respondent v. General Motors of Canada Limited, Intervener

Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Union's handling of grievance prior to and at arbitration hearing alleged to have violated the Act - Complaint filed three years after internal grievance process ended and $9\frac{1}{2}$ months after arbitration hearing - Whether Board should decline to hear complaint because of delay - Board reviewing and applying factors set out in City of Mississauga case - Complaint dismissed

BEFORE: Susan Tacon, Vice-Chair.

APPEARANCES: Harry Kopyto and John Kohut for the complainant; L. N. Gottheil, Robert E. Tindale, Robert J. Ryan, Pat Clancy and Richard Fleming for the respondent; E. T. McDermott, Dave Demartile and Margaret Szilassy for the intervener.

DECISION OF THE BOARD; December 9, 1991

1. In this complaint alleging violation of section 68 of the Labour Relations Act, the Board has issued two interim decisions. The first, reported at [1990] OLRB Rep. Oct. 1043, dismissed the preliminary motions of the complainant's representative other than to permit the complainant's representative (and any other party, if so desired) to make a tape recording of the proceedings on the basis stated in that decision. The second, reported at [1991] OLRB Rep. Jan. 35, dismissed the complaint for failure to disclose a prima facie case except with respect to the allegations, as pleaded, concerning the union's handling of the complainant's grievance prior to arbitration and the union's agreement to admit the transcript of the complainant's trial as evidence at the arbitra-

tion hearing. What remained of the complaint was the context for the preliminary motion dealing with delay which is the subject of this decision.

- With respect to the remaining preliminary motion, the company and the union called no evidence, relying on the record as pleaded to demonstrate, in their view, undue delay. The complainant's representative called several witnesses, including the complainant and his counsel at the time of the arbitration hearing, to explain why the complaint was not filed until June 15, 1990. While the issue before the Board at this juncture is delay rather than the merits, the testimony, particularly during examination in chief, tended to spill over into the merits. The Board indicated that that testimony would be applied to the merits if the Board ultimately dealt with the substance of the complaint but restricted the company and the union to cross-examination only on the delay aspect. It was agreed that those witnesses would be recalled should the Board hear the complaint on the merits.
- 3. In reaching its factual findings, the Board has weighed and assessed the testimony according to the usual factors going to credibility in the context of the documentary material filed with the Board and in the context of what is reasonably probable in the circumstances. It is useful at this point to comment briefly on the credibility of the witnesses, although further comments on that issue are addressed as appropriate throughout the decision.
- 4. Several of the complainant's friends and former co-workers testified. The Board does not regard their testimony as of assistance. The thrust of their evidence was the ostensible impact on the complainant's health and personality of the arbitration award issued in mid-September 1989 upholding the complainant's discharge in order to explain the delay between that point and June 15, 1990 when the complaint was filed. In the Board's view, their statements were couched in repetitive catch-phrases and are not to be believed in the circumstances. There was no evidence from qualified medical practitioners, psychiatrists or psychologists.
- 5. The complainant himself was entirely without credibility. His testimony was not only self-serving in the extreme but contradictory and evasive during cross-examination. The complainant exhibited a penchant for fabricating new explanations for events when pressed in cross-examination on the implausibility or inconsistencies in his earlier testimony. It should be noted that, when pressed on his inconsistent testimony, the complainant frequently stated that the passage of time made it difficult to recall some facts quickly or accurately but that, as cross-examination went on, he recalled further details. In the Board's view, what happened was that, as cross-examination went on, the complainant tried to patch up or modify his story to respond to what he perceived as weaknesses in his explanation for the delay.
- 6. Ben Fedunchak, complainant's counsel at the arbitration hearing, also testified on behalf of the complainant. Where the complainant tended to create explanations as needed, Fedunchak, with respect, could best be described as forgetful. He could not recall significant events such as when he was retained and the bulk of his testimony took the form of vague generalities as to his representation of the complainant. He could not recall with any certainty dates of meetings with the complainant, subjects discussed or advice given, to list but a few examples.
- 7. In the above context, the Board makes its findings of fact. While the preliminary motion deals solely with the delay issue and that is the focus of the factual findings, additional factual context is sketched as appropriate.
- 8. The complainant was employed at the company's plant in Oshawa for approximately eleven years prior to his termination on March 31, 1986 for the alleged theft of a car radio. The union filed a grievance on the same day challenging the dismissal. The grievance proceeded

through the requisite steps in the grievance procedure. The matter was not resolved between the company and the union and the grievance was referred to arbitration following the fourth step meeting. In cross-examination, the complainant indicated he had concerns with respect to the quality of his representation by the union during the internal grievance process but conceded there were no allegations relevant to this period in the complaint filed with the Board.

- 9. The complainant was also charged with theft and appeared in court on several occasions from April 1986 to August 1987 when he was convicted. The complainant was represented by counsel (G. Ecclestone) at his criminal trial. An appeal of that conviction was launched immediately. The complainant was represented on appeal by different counsel (Prendonville). The appeal was heard in December 1988; the conviction was overturned and an acquittal directed.
- The complainant acknowledged that the union was in no way responsible for the various delays in the court proceedings. While he asserted that he queried the delay between June 1986 and August 1987 in setting an arbitration date, the complainant conceded that the instant complaint did not refer to that delay as an alleged contravention of section 68. In any event, the arbitration hearing was initially scheduled for June 16, 1988. At this point, the complainant wanted the arbitration delayed until after his appeal was heard; indeed, the complainant insisted on an adjournment. The complainant admitted that the union informed him that the company was only prepared to consent to the adjournment if its liability did not run past June 1988 should the complainant ultimately be reinstated. The complainant testified that, although he was making more money at that point than he earned at the company (and therefore there would be no financial loss in agreeing to limit liability as the company insisted), he did not agree to the condition for the adjournment notwithstanding his insistance on that adjournment. The matter was, in fact, adjourned. The "conditional" basis for the adjournment in June 1988 constitutes one of the alleged violations of section 68.
- The complainant testified that he reviewed the matter with Prendonville, his counsel 11. with respect to the appeal of his conviction, who advised him not to take any action against the union until after the appeal hearing in December 1988. In chief, the complainant placed the first contact with the Board in November or December 1988 where, in a telephone conversation, he was told nothing could be done until the arbitration was completed. In cross-examination, at one point the complainant testified that, in May or June 1988, he came to 400 University Avenue to the Board and to the Human Rights Commission to find out what his "rights" were vis-a-vis the "police, the courts, the company and the union". The complainant testified that "someone on the first floor" told him that the Board had no jurisdiction, could not help him until the entire grievance was resolved and that the Board would not do anything until the arbitration was over. Later in cross-examination the complainant stated this incident occurred in late 1988 following his acquittal of the criminal charge on appeal on December 15, 1988. Still later in cross-examination, the complainant stated that he visited the Board's 4th floor reception area seeking advice following his acquittal in December 15, 1998 and was told to wait until the arbitration hearing was over. These various and conflicting explanations illustrate the complainant's willingness to alter his testimony to respond to probing cross-examination. The Board does not accept this testimony.
- 12. The complainant gave contradictory testimony, as well, regarding his contact with union officials prior to April 1989. The complainant indicated he informed the union of his acquittal at some point between December 1988 and April 1989. He also testified in cross-examination but not in chief that he met with the union regarding his grievance sometime between June 1988 and December 1988 although he couldn't recall when.
- 13. In April 1989, the complainant was told the arbitration was scheduled for April 26 and

then, when an earlier date became available, the hearing was moved to April 12, a change to which he agreed. The union officials (including R. Tindale and R. Ryan) met with the complainant on April 6 to prepare for the hearing. Much of that discussion more properly related to the substance of the section 68 complaint, and, in that regard, the Board heard only from the complainant, not the union's witnesses. The complainant acknowledged that the discussions included reference to credibility being a key issue at arbitration, the complainant's apparently different versions of the events leading to his possession of the radio, the reference to those matters in the transcript of the trial proceedings and the admissibility of the transcript at the arbitration hearing. The complainant's account of the April 1989 meeting was that he took the position that the transcript was "illegal" given the appeal court's decision and could not be admitted. What is relevant to the issue of delay, is that the complainant again insisted on an adjournment and wished to consult a lawyer about his case. The union agreed to obtain a further adjournment so the complainant could seek legal advice.

- With respect to the period between the April 1989 meeting with the union and June 14. 1989, the complainant's account of his actions is again contradictory. In examination in chief, he testified that he visited the Board's offices on the 3rd or 4th floor in April or May 1989 regarding his grievance and was again told to wait for the outcome of the arbitration. At one point in crossexamination, he stated that it was difficult to recall whether he attended at the Board at all between December 1988 and the August 1989 arbitration but he thought perhaps he was there in March 1989. At yet another point in cross-examination, the complainant stated he only telephoned the Board in May 1989. As well, the complainant testified at various points in cross-examination that: he phoned "all kinds of lawyers" in this April to May period, at least two or three and maybe five or six; he saw a couple of lawyers; he called Prendonville again about his grievance; he met with one lawyer (S. Menzies) who referred him to a labour lawyer whose name the complainant couldn't recall; he met with a lawyer in the Warden and Lawrence area whose name he couldn't recall. Then, through a friend, the complainant was referred to B. Fedunchak, a lawyer whom he retained in early May 1989. In the face of such conflicts, the Board is not persuaded that the complainant actively pursued the matter during this period other than to contact Fedunchak whose name he learned through a friend.
- 15. The company agreed to adjourn the April 1989 arbitration provided that the hearing was re-scheduled for either of two specified dates. The complainant informed the company by letter dated May 8, 1989 that he would be represented by counsel, B. Fedunchak, at the arbitration and that August 30, 1989 was selected as the hearing date.
- The complainant waived solicitor-client privilege with respect to his discussions with his lawyer, Fedunchak. The Board first recounts the complainant's various versions of what was discussed in May 1989. In cross-examination, the complainant initially stated they (the complainant and Fedunchak) discussed the possibility of filing a complaint at the Board against the union but decided not to pursue that option until after the arbitration. The complainant's concerns about the 1988 adjournment on conditions limiting his financial compensation should the grievance ultimately succeed and about the union's negative attitude of the prospects for success at arbitration were discussed as well in May 1989, as was the complainant's view that the union should have demanded his reinstatement following the court of appeal decision. The complainant, however, at a later point in his testimony, stated that he and Fedunchak were not speaking of a complaint against the union at all except to comment that neither could figure out why the grievance couldn't be resolved at the fourth stage.
- 17. Fedunchak gave a different account of those discussions. He could not recall when he first spoke with the complainant or was actually retained. According to Fedunchak, the complain-

ant expressed his unhappiness with his representation by the union. He (the complainant) felt the union was missing some issues and was not putting forward the case properly. Fedunchak did not discuss specifics with the complainant at that point. Fedunchak also stated he repeatedly advised the complainant to rethink his relationship with the union and use its counsel for the arbitration or retain a labour lawyer. According to Fedunchak, the complainant said he had tried unsuccessfully to retain a number of lawyers but at least some of those asserted a conflict of interest in representing the complainant because of their relationship to the company or the union. Fedunchak also recommended some lawyers to the complainant but could not recall their names. In Fedunchak's opinion, he agreed to represent the complainant rather than let him appear unrepresented at the arbitration hearing. Fedunchak could not recall seeing exhibit number 3, the May 8, 1989 letter from the complainant to the company confirming that Fedunchak had been retained for the arbitration, and this document, when shown to him, did not refresh Fedunchak's memory as to when he was retained.

- 18. Although the testimony about the discussions between Fedunchak and the complainant in May 1989 and thereafter to the point of the arbitration hearing on August 30, 1989 is somewhat contradictory, the Board is satisfied that it is more probable than not that the complainant discussed any concerns he had about the union with his counsel.
- 19. In any event, Fedunchak acknowledged that he did prepare for the arbitration hearing scheduled for August 30, 1989. Fedunchak contacted the company representative, J. Shantz, requesting a consent adjournment of the arbitration hearing shortly before the day scheduled but that request was refused; he did not contact the union about that matter. Fedunchak testified that his reason for seeking an adjournment was primarily so that he could initiate an action for replevin. In Fedunchak's view, following the complainant's acquittal on appeal, the radio in question was therefore the complainant's property and, if the complainant could recover that property through an action for replevin, the company would be unable to produce the radio at the arbitration hearing and the arbitration would be decided in the complainant's favour.
- 20. At the arbitration hearing, the complainant was represented by Fedunchak; the union officials (Ryan and Tindale) were also present and communicated with Fedunchak during the hearing. The company sought to have the transcript of the trial proceedings admitted to prove prior inconsistent statements by the complainant. Fedunchak stated he was "shocked" at this development. Fedunchak opposed that motion and made submissions. According to the complainant, Fedunchak said something to the effect "we should pack our bags and leave" if the transcript was admitted. The arbitrator did admit the document. The allegation before the Board is that the transcript was admitted because of the union's agreement (without the complainant's consent) to admit the document.
- 21. Following the arbitration, the complainant testified he telephoned Fedunchak twice inquiring as to whether the arbitration decision had been released. That decision was dated September 12, 1989 and was forwarded to Fedunchak under a cover letter dated September 13, 1989. Fedunchak could not recall when he received the award or how soon thereafter he contacted the complainant. The complainant testified the two met near the end of September. Fedunchak stated that he met with the complainant approximately six times following the arbitration award, although he was retained only to represent the complainant at the arbitration hearing. At these meetings, his advice was that the complainant should "follow up" the matter by challenging the arbitration award on judicial review for error of law and by pursuing a complaint against the union before the Board. The complainant testified that he already knew he could file a complaint with the Board from his contacts in 1989. Fedunchak said he advised the complainant to retain a labour lawyer as his (Fedunchak's) expertise was in criminal law and, in Fedunchak's view, different coun-

sel should be retained for any appeal proceeding. As well, Fedunchak stated he had never before filed a complaint with the Board or appealed an arbitration decision. The complainant testified that he was satisfied with Fedunchak's services and that Fedunchak told him in September he would help him file a complaint but labour law was not his best subject and the complainant should retain a labour law specialist. The complainant further testified that he tried unsuccessfully to contact a number of lawyers but those possibilities fell through for reasons including conflicts of interest and fees. Again, Fedunchak suggested several names but the most specific he could be was that one of the persons was female. Fedunchak testified that he recalled seeing a list of over twenty lawyers' names in the complainant's possession but could not be more specific as to whether this was before or after the arbitration; Fedunchak thought that the list represented lawyers whom the complainant had contacted or tried to contract. No such document was filed with the Board. The complainant testified that he used the Law Society's referral service and the yellow pages in his efforts to retain counsel. He stated he saw at least five or six lawyers but did not retain any.

- 22. In addition to his meetings with Fedunchak following the issuance of the arbitration decision, the complainant testified that he telephoned the Board in early October "unofficially" (in the complainant's view) and "officially" in the second week of November seeking to file a complaint. In the "unofficial" call, the complainant stated that he did not request that the Board mail any information as he was debating whether the complaint should be filed by himself, Fedunchak or another lawyer. The material from the Board, including the forms, the Guide to the *Labour Relations Act* and an information sheet arrived within two or three days of the November telephone call.
- In November 1989, the complainant again met with Fedunchak. According to the complainant, they reviewed the Board materials and Fedunchak reiterated his view that the complainant should retain a specialist. The complainant stated he was seeking "advice" generally from Fedunchak rather than assistance in formally filing a compliant. Nonetheless, Fedunchak did partially complete a complaint form, in his words, to "show the complainant how to fill out a complaint" "as a precedent". Fedunchak could not recall whether he gave any specific advice regarding time limits for appealing the arbitration award or filing a complaint with the Board. He believes he told the complainant to set out the chronology of events in a letter to be attached to the complaint. Fedunchak stated it was unlikely he drafted such a letter as he did not wish to be involved in the appeal, although he could not recall whether he did or not. The form (exhibit 10) which Fedunchak states he reviewed with the complainant, was filed in evidence with the Board and indicates the time period in which the alleged contravention of section 68 occurred was "March 28, 1986 to April 10, 1989". Fedunchak was evasive in cross-examination when asked why the time period did not include August 30, 1989 (the date of the arbitration hearing when the alleged union agreement to admit the transcript occurred) if that incident was as "shocking" and improper as Fedunchak testified. Fedunchak finally replied that exhibit 10 was merely a precedent for the complainant to follow in completing the complaint. Fedunchak recalled the complainant had additional material from the Board but could not remember whether that was reviewed with the complainant.
- During the winter of 1989-90, the complainant testified he continued his fruitless search for counsel, including phoning legal aid. He stated he became worried whether he was taking too long to file the complaint and, in January of February 1990, went to the Board's 3rd or 4th floor reception area where he testified he was told there was "lots of time", there was "no time limit" and he should "take his time to get advice because, if there was an error, the complaint could be thrown out". Finally, in April or May, the complainant contacted his current representative. Several meetings ensued during which the complainant testified he reviewed the events of the last four or five years, including a considerable volume of paperwork. The complaint was filed June 15, 1990 and amended in an undated letter received by the Board on July 20, 1990.

- 25. In paragraphs 21 to 24, the Board has set out the testimony of the complainant and Fedunchak with respect to the complainant's efforts to pursue his complaint against the union. The Board is not persuaded by this testimony that the complainant actively pursued his concerns beyond obtaining the Board forms and preparing a "draft" complaint with Fedunchak prior to the point he contacted his current representative.
- There was considerable testimony about the complainant's state of mind during the period prior to the filing of the complaint. S. Blanchard testified that, following the arbitration, the complainant was indecisive, withdrawn, short-tempered rather than easy going as in the past, suffered from insomnia, "ate like a chicken" and had lost confidence in himself. Indeed, at the April 19, 1989 meeting with the union where the complainant insisted on an adjournment to prepare for the case (a meeting which Blanchard attended), Blanchard stated the complainant was so anxious he (the complainant) said he would obtain a doctor's note to force an adjournment of the proceedings if necessary. J. Santino testified that, following the arbitration, the complainant was despondent, moody, had difficulty making clear-cut decisions, had a complete personality change, and showed a lack of initiative. Indeed, at any point from the date of his termination, whenever formal proceedings neared, Santino stated the complainant became anxious and stopped taking care of himself. Fedunchak repeatedly testified that, following the arbitration, the complainant became sad, lethargic, moody and lacked his usual "spunk". The complainant testified that he had been upset since he was fired because he had not been treated fairly. Following the arbitration, he stated he was physically and emotionally drained, found it difficult to concentrate, needed rest and was depressed about his low financial resources. No medical or psychological evidence was presented to the Board to corroborate the descriptions of the complainant's state of mind. Without such evidence, the Board does not accept this testimony given its view of the credibility of the various witnesses, as noted.

ARGUMENT

- 27. The Board next sets out the submissions of the parties in highly abbreviated form.
- Company counsel argued that the sequence of events constituted undue delay on a prima facie basis and the onus fell on the complainant to establish a satisfactory explanation for that delay. In reviewing the complainant's "excuses" for the delay involved, counsel submitted the Board must determine whether those excuses, if believed, constituted a compelling explanation for the delay despite the Board jurisprudence and the policy considerations therein requiring prompt filing of complaints and, further, whether those excuses were believable at all or merely a pretext brought forward at this point to persuade the Board to hear the merits of the complaint. Counsel submitted that credibility was central to this determination and the complainant was not a credible witness. Counsel noted that the Board had the discretion in section 89(4) of the Act as to whether or not the Board should inquire into the merits of a complaint. Counsel reviewed the testimony in considerable detail dividing the events into three stages: up to June 1988 when the internal grievance process essentially ended; the April 1989 events; the period from the retaining of Fedunchak by the applicant in May 1989 through the arbitration hearing on August 30, 1989 to the filing of the complaint on June 15, 1990. It was contended that the explanations given for the delay involved throughout were neither genuine nor a compelling basis on which to proceed to hear the merits of the complaint which alleged misconduct by the union reaching as far back as 1986 through to the arbitration hearing on August 30, 1989. Counsel also stressed that the complainant had had "his day in court" at the arbitration hearing where his 1986 dismissal as an employee was litigated and the complainant, represented by his own counsel, had lost. It was submitted that the complainant's real goal was relitigating that dismissal using the section 68 complaint as a pretext towards that end. In reply, counsel disputed the limitation periods in other jurisdictions as stipulated to by the

complainant's representative. Counsel submitted the "clock began ticking" at the arbitration hearing where the union's misconduct was alleged to have occurred; that there were no labour relations policy reasons permitting a party to wait until the potential injury was actualized. In the alternative, if the Board took, as a starting point, the juncture at which the issues crystallized, it was argued that point on the evidence was: the date in 1988 when the union obtained an adjournment on the basis that compensation would be limited; in April 1989 when Tindale allegedly refused to thereafter to represent the complaint; and on August 30, 1989 when the alleged "deal" to introduce the transcript was executed. Counsel contended that each of those points was too far back in time to warrant a hearing on the merits now. Those cases referred to by the complainant's representative were commented upon at some length. Case cited by counsel for the company included: The Corporation of the City of Mississauga, [1982] OLRB Rep. March 420; Sheller-Globe of Canada, Ltd., [1982] OLRB Rep. Jan. 113, application for judicial review dismissed at 83 CLLC ¶12,275 (Ont. Div. Ct.); Chrysler Canada Limited, [1982] OLRB Rep. Oct. 1417; Chrysler Canada Ltd. [Board File 2200-83-U], unreported, Oct. 15, 1984] (hereafter referred to as the Narayan case); Re City of Toronto and Canadian Union of Public Employees, Local 79 (1982), 133 D.L.R.(3d) 94(O.C.A.).

- 29. The union's representative noted that it was the company which initially raised the preliminary motion with respect to delay, but, given the evidence heard, the union supported the company's position. Some specific aspects of the testimony were reviewed in support of the contention that the question of credibility was crucial in this case and that the complainant was not a credible witness. The union's representative also argued that the complainant's real concern was to relitigate his discharge and the section 68 allegation's were an attempt to achieve that goal. In reply, it was acknowledged that there were no specific time limits for filing a complaint with the Board but it was asserted the Board jurisprudence emphasized *prompt filing of complaints. Even in the complainant's best case scenario, the union's representative contended that the delay was excessive and, given the complainant's lack of credibility, unexplained.
- The complainant's representative asserted that the onus lay on the company and the union to establish that the delay was undue and the Board cases indicating that the onus shifted to the complainant to explain the delay were wrong. It was agreed that the Board had the discretion in section 89(4) of the Act to refuse to hear a complaint because of undue delay but it was contended that such discretion should be exercised reasonably. In the absence of a statutory limitation period, the complainant's representative submitted that what constituted unreasonable delay should be determined in the context of each case and any reasonable doubt should be resolved in the complainant's favour so as to give effect to the remedial import of the legislation. The statutory limitation periods in other jurisdictions were noted as guides to the Board in the exercise of its discretion. The complainant's representative argued that the jurisprudence framed the test as "months not years" but accepted considerable periods of delay in fact. It was submitted that the time started "running" when all the facts needed to establish the complaint had crystallized and the ultimate consequences of the alleged violation were suffered. In the instant case, that was not until the complainant learned of the arbitrator's decision in late September 1989, even with respect to allegations dealing with events much earlier during the grievance process. The complainant's representative argued that the company and the union, in calling no witnesses, had not established actual prejudice to hearing the merits of the complaint. It was asserted that the issue of credibility was irrelevant to the question of delay in the context of a preliminary motion and, in any event, the complainant was a credible witness whose testimony was corroborated by all the witnesses. The complainant's representative portrayed his client as an unsophisticated but truthful witness; the inconsistencies in his testimony were characterized as minor and related to peripheral matters. It was contended that, even if the delay was undue, the Board could deal with that aspect in determining the appropriate remedy should the complaint be upheld. The evidence was reviewed in sup-

port of the submission that the complainant had, by and large, accounted for the period from late September 1989 to June 1990. That period, it was submitted, was reasonable in the circumstances and less than those instances in the caselaw where the Board had exercised its discretion not to inquire into the merits of a complaint. The complainant's representative argued that the union ought to have been aware in April 1989 when the complainant sought out his own counsel that the complainant was less then enthusiastic about his representation by the union. In short, the delay was reasonable and adequately explained so that the Board should hear the merits of the complaint. The complainant's representative reviewed a number of Board decisions and sought to distinguish those cited by company counsel. Cases referred to by the complainant's representative included: Concrete Construction Supplies, [1982] OLRB Rep. Oct. 1446; Inco Metals Company, [1982] Rep. May 681; Cameron Douglas Wonch, [1984] OLRB Rep. Nov. 1659; Douglas G. Poole, [1984] OLRB Rep. June 856; Central Stampings Limited, [1984] OLRB Rep. Feb. 215; Catherine Whittaker, [1985] OLRB Rep. Apr. 621; Tecumseh Products of Canada, Limited, [1985] OLRB Rep. Jan. 123; Toronto Housing Labour Bureau, [1987] OLRB Rep. Sept. 1178; Gary Hopkins, [1985] OLRB Rep. May 684; George Hinkson, [1987] OLRB Rep. Oct. 1246; Calorific Construction, [1988] OLRB Rep. Feb. 115.

DECISION

- 31. The Board's discretion to decline to hear a complaint on the merits is grounded in section 89(4) of the Act and was not disputed. Over the years, the Board has developed a considerable body of jurisprudence dealing with the exercise of that discretion. The Board regards that caselaw as an appropriate framework in which to consider the preliminary motion in the instant complaint and does not consider the statutory limitation periods in other jurisdictions (whether or not stated accurately by the complainant's representative) as helpful. It is also useful to note here that the preliminary motion to dismiss the complaint because of the delay in filing was raised by the company as intervener but supported by the respondent trade union, unlike the circumstances in George Hinkson, supra, where the Board emphasized there that the "the respondent against which the complaint is directed does not seek to have it dismissed without a hearing on the merits", in reaching its decision to proceed to a determination on the merits.
- 32. The following passage from *The Corporation of the City of Mississauga*, supra, is regarded as a seminal exposition of the Board's approach to the issue of timeliness in the duty of fair representation cases:
 - 20. It is by now almost a truism that time is of the essence in labour relation matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once chrystallized [sic], could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it including the employees are entitled to expect that claims which are not asserted within a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims. (See *Re C.G.E.3 L.A.C. 980 (Laskin)* and *Re Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited* [1966] 18 L.A.C.51 (Arthurs)).
 - 21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bar-

gaining relationship - quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

- 22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reason for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to the parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.
- The complainant's representative pointed to a number of decisions wherein the Board declined to hear the complaint because of delay but which involved periods of delay well in excess of that in the instant case: for example, Sheller-Globe, supra, (2½ years); The Corporation of the City of Mississauga, supra, (5 years); Douglas G. Poole, supra, (31/2 years); Catherine Whittaker, supra, (19 months); Gary Hopkins, supra, (at least 3 years); Concrete Construction Supplies, supra, (3 years). The Board regards those cases as consonant with the principles enunciated above; the cases do not stand for the proposition that the Board would have held a merits hearing had the delay been somewhat less. Only two cases were cited wherein the Board proceeded to hear the substance of the complaint: George Hinkson, supra and Central Stampings, supra. In George Hinkson, the Board refused to dismiss the complaint notwithstanding a delay of two years although the Board cautioned that the delay might well be considered with respect to any remedy should a contravention of the statute be found. The Board therein pointed to the complainant's lack of sophistication regarding labour law matters, his need to obtain legal aid complicated by his change of address and change of solicitors, the fact that the preliminary motion was supported solely by the intervener (as noted earlier) and the lack of any specific prejudice. The Board has already commented on the distinction between the instant case and George Hinkson in paragraph 31. In Central Stampings, the Board considered the 15 month delay in filing a complaint as insufficient to warrant its dismissal without a hearing on the merits because both the intervener company and the respondent trade union were adequately put on notice within some six to nine months of potential legal proceedings arising from the discharge grievance. With respect to Central Stampings, supra, the Board does not find the circumstances apposite given that, in the instant case, the company and the trade union had no notice prior to the date the complaint was filed with the Board on June 20, 1990 of an impending section 68 complaint in which the complainant would seek to have a re-litigation of his discharge. The complainant's representative argued that the union would have been put on notice of the complainant's displeasure with the quality of his representation by the union in April 1989 when the complainant wanted independent legal advice. The Board does not agree. The Board need not here repeat the facts found at paragraphs 12 and 13 above. What is relevant is that the complainant, in April 1989, insisted on a further adjournment of his arbitration and independent legal advice, and the union complied with those requests. The complainant obtained an adjournment to August 30, 1989 (the date selected by the complainant from two dates offered by the company) and retained his own counsel, Fedunchak, in May 1989. Counsel prepared for and conducted the arbitration hearing, which the union officials attended and during which (on the evidence of the complainant's witnesses) they communicated with Fedunchak. There is nothing in this

sequence of events which would reasonably have alerted the union (or the company) that a section 68 complaint was lurking in the wings before its filing in June 1990. (The Board does not regard it as necessary to deal with *Chrysler Canada Limited*, *supra*, as the issue of delay therein was determined prior to *Sheller-Globe*, *supra* and *The Corporation of the City of Mississauga*, *supra*, as noted in the reported decision itself at paragraph 61. Nor is *Inco Metals Company*, *supra*, helpful as the issue therein dealt with the delay in the context of the election doctrine in *Occupational Health and Safety* complaints and bears no real resemblance to the instant circumstances).

- The delay in a number of cases in which the Board has declined to hear the complaint 34. has approximated one year: for example, Narayan, supra; Tecumseh Products, supra, Cameron Douglas Wonch, supra; Calorific Construction, supra. In this regard, it is necessary to review the assertion of the complainant's representative that the delay in the instant case should be measured from the date the complainant learned of the arbitration decision in late 1989 to the date the complaint was filed, a period of 81/2 months. The complainant's representative submitted that the "clock did not start ticking" until this point - where the grievance and arbitration process finally ended and his termination was confirmed - even through some of the alleged violations of section 68 occurred much earlier. In the Board's view, such an approach would negate the labour relations considerations outlined in the City of Mississauga, supra, and which permeate the Board's jurisprudence in this area. To do as the complainant's representative seeks, would require the union to defend its conduct against allegations dating back to June 1988 (when the internal grievance process essentially ended) or April 1989 (when the complainant sought independent legal advice) without notice that their conduct in those periods allegedly fell short of the duty of fair representation standard. The Board will not permit a complainant to lull another party into believing its conduct is acceptable only to have that conduct attacked years later. The jurisprudence has stressed that the passage of time is inherently prejudicial; where the delay is excessive, the opposing parties need not establish specific prejudice. The Board affirms that reasoning herein. Those allegations dealing with the period prior to the arbitration hearing in August 1989 are dismissed as too far back in time to be fairly litigated now given the absence of adequate notice to the union that its conduct was alleged to have contravened its duty of fair representations and given the absence of a credible and reasonable explanation for the delay. The factors outlined in more detail below have been considered by the Board in reaching its determination in this paragraph as well, but need not be elucidated further in the circumstances in determining that the allegations dealing with matters prior to the arbitration hearing should not be considered on their merits.
- 35. The remaining allegation concerning the admission of the transcript at the August 30, 1989 arbitration is more problematic and requires further consideration. The arbitration hearing was held on August 30, 1989. According to the complainant's witnesses, the admission of the transcript of the trial on the alleged agreement of the union was "shocking" and highly prejudicial to the complainant's defence. The thrust of the testimony of the complainant and Fedunchak was that the case was lost once the transcript was admitted. The Board regards that date as the point from which the delay must be measured. The complainant need not necessarily have filed this complaint immediately thereafter; the complainant could have otherwise put the union on adequate notice that its conduct at the arbitration hearing was impugned. But a complainant who awaits the final outcome in one forum before initiating proceedings before this Board and does not put a respondent on notice of such potential litigation in the interim, risks the exercise of the Board's discretion to decline to hear a complaint because of the effect of such a delay.
- 36. Thus, with respect to the remaining allegation of impropriety by the union at the arbitration hearing, the delay in filing the instant complaint is $9\frac{1}{2}$ months. Standing alone, that delay may not be regarded as so excessive so as to deprive a complainant of an adjudication on the mer-

its. However, in the instant context, the Board does consider it appropriate to decline to entertain the complaint on the merits for the following reasons.

- 37. It is useful to revisit the passage in *The Corporation of the City of Mississauga*, *supra*, which outlines, although not exhaustively, various factors that are generally considered by the Board with respect to the issue of delay:
 - 22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reason for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to the parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

[emphasis added]

The Board next considers each of those factors in the context of the instant case.

- 38. As noted above, standing alone, a delay of 9½ months is not generally considered to be so excessive as to warrant dismissal without a hearing on the merits. However, critical to the Board's determination is an assessment of the reasons offered by a complainant for any delay involved in bringing the complaint. Critical to an assessment of the reasons is the credibility of the complainant and any witnesses called on the complainant's behalf. Whenever evidence is led through *viva voce* testimony, the Board is called upon to consider issues of credibility, regardless of whether such testimony occurs in the context of a preliminary motion or an adjudication on the merits. The Board is not here dealing with a preliminary motion to dismiss a complaint as not making out a *prima facie* case where the material facts pleaded are assumed true and could be proved at a hearing. Rather, in the instant case, the complainant's representative called witnesses to establish that the reasons for the delay were compelling; those witnesses were subject to cross-examination. Thus, an assessment of credibility is inevitable and necessary to the proper exercise of the Board's discretion. Furthermore, the Board's jurisprudence has clearly placed on the complainant the onus of providing candid and compelling reasons to account for the delay and the Board rejects the bald assertion of the complainant's representative that those cases are wrong.
- 39. The Board need not repeat its earlier comments about the complainant's lack of credibility. The Board has set out some of the testimony of the complainant and Fedunchak to give the flavour of the inconsistencies and implausibilities in that testimony. The testimony as to the complainant's impaired physical and emotional condition following the arbitration award is in the form of vague generalities and uncorroborated by medical evidence. Moreover, even if that evidence could be given some credence, it would not establish that the complainant's state was such as to render him unable to file the complaint promptly: *Douglas G. Poole*, *supra*. Throughout the relevant period, the complainant sought out new counsel, met on several occasions with Fedunchak, and contacted the Board he simply did not file a complaint. The complainant also attempted to explain his delay by testifying that the Board had given him advice on several occasions prior to the arbitration hearing to the effect that the Board had no jurisdiction to hear the complaint until the arbitration was concluded and, following the arbitration hearing, that there were no time limits and that he should take his time to have the complaint completed properly or it could be dismissed. The Board does not accept this testimony. The number and timing of the alleged contacts with the

Board reflected the complainant's sense at that point in cross-examination of the obvious weaknesses in his explanation for his inaction. Moreover, the information sheet and the *Guide to the Labour Relations Act* which the complainant acknowledges he received and reviewed in November 1989 both expressly note that the Board cannot give legal advice as to the appropriate steps to take in any particular circumstances.

- 40. Thus, in the instant case, the Board has no credible and reasonable explanation for the delay involved in the period between the arbitration hearing and the filing of the complaint.
- 41. Further, the complainant was aware of the alleged improper conduct the allegation that the union agreed with the company to admit the transcript at the arbitration hearing itself. Fedunchak opposed the company motion to admit the transcript and made representations to the arbitrator regarding the transcript's admissibility. The complainant and Fedunchak discussed the matter at the arbitration hearing and in the weeks following the hearing. The complainant was aware that he could file a complaint at the Board alleging the union's conduct constituted a contravention of section 68 of the Act. The Board must also weigh the delay in filing a complaint in light of the Board's recognition that prompt notice to the other parties is essential to a fair hearing, as codified in Rule 72 of Regulation 546 enacted under the *Labour Relations Act*. The underlying rationale for Rule 72, and the Board's power therein to preclude a party from adducing evidence at a hearing of those matters where there has not been prompt notice of alleged improper conduct, would be undermined if the Board were to sanction significant delay in filing the complaint itself except where the complainant provides a credible and reasonable explanation for the delay. This factor, as well, does not assist the complainant.
- 42. The next factor refers to the nature of the remedy claimed. The relief sought by the complainant may well involve retrospective financial liability and, to use the phraseology of *The City of Mississauga*, *supra*, could significantly impact upon the pattern of relationships which has developed since the alleged contravention.
- With respect to the factor dealing with fading recollection and the prejudice to the other parties, it is evident that, by the time the complaint was filed, many months had passed since the arbitration hearing in August 1989. Thus, there would likely have been some diminution in recollection by that time. However, in the absence of specific evidence of prejudice or the passage of such a lengthy period that no such evidence of specific prejudice would be necessary, this factor is of relatively limited assistance in the circumstances of this case.
- The Board, as stated in the excerpt above, has generally given "some latitude" to "par-44. ties who are unaware of their statutory rights or who, through inexperience take some time to properly form their concerns and file a complaint". However, no such latitude is warranted in the instant case because the complainant already had counsel at the relevant time. Whether a complainant was represented by counsel during the relevant period is a material fact which can properly be taken into account in the exercise of the Board's discretion: The Corporation of the City of Mississauga, supra; Catherine Whittaker, supra; Tecumseh Products, supra; Gary Hopkins, supra. In the instant case, the complainant had counsel throughout his court proceedings and, on his own evidence, spoke with Prendonville (who handled the complainant's appeal from his criminal conviction) about his discharge grievance in the spring of 1989. More critically, from a point over one year prior to the complaint's filing, from May 1989 through the arbitration to some point in November 1989, the complainant was represented by or at least actively consulting Fedunchak. The chronology of events from the complainant's dismissal onwards was reviewed and the issue of the union's representation discussed. Fedunchak was retained to represent the complainant at the arbitration hearing. Indeed, Fedunchak assisted the complainant in completing a "draft" complaint

in November 1989. Fedunchak testified that he urged the complainant, both before and after the arbitration hearing, to retain counsel with expertise in labour relations, implicitly acknowledging that his advice may not have been the best. Whether Fedunchak served the complainant well need not be determined by this Board; any risks of inappropriate or incorrect advice are to be borne by the complainant not the respondent or intervener: *Tecumseh Products*, *supra*; *Gary Hopkins*, *supra*. Although, this factor alone is not determinative, it is highly relevant and certainly does not weigh in the complainant's favour in the instant case.

- 45. The factors outlined in *The City of Mississauga*, *supra* have not been accorded any defined weight or ranking relative to one another. Rather, the weight and importance of the various factors will depend upon the circumstances in each case. In the instant case, the Board is satisfied that all but one of the factors militate against hearing the complaint with respect to the alleged agreement by the union to admit the transcript on the merits.
- 46. Accordingly, for the foregoing reasons, the Board exercises its statutory discretion under section 89 of the *Labour Relations Act* to decline to entertain further the complaint, as that complaint was confined by the Board's decision reported at [1991] OLRB Rep. Jan. 35 (i.e., to the allegations, as pleaded, concerning the union's handling of the complainant's grievance prior to arbitration and the union's agreement to admit the transcript at evidence at the arbitration hearing). Thus, the preliminary motion of the intervener, joined in by the respondent, is upheld and the complaint is hereby dismissed.

3103-90-R Practical Nurses Federation of Ontario, Applicant v. **The Mississauga Hospital**, Respondent v. United Steelworkers of America, Intervener

Bargaining Unit - Certification - Board finding hospital bargaining unit comprised solely of Registered Nursing Assistants an appropriate bargaining unit

BEFORE: M. A. Nairn, Vice-Chair, and Board Members W. A. Correll and K. Davies.

APPEARANCES: Douglas Wray, Terrence Whyte, Verna Steffler, Gail Bennett and Otalene Shaw for the applicant; Vincent Johnston, Nancy Myers and Mary Kuzyk for the respondent; Jonathan Eaton and Brando Paris for the intervener.

DECISION OF VICE-CHAIR M. A. NAIRN AND BOARD MEMBER, K. DAVIES; December 5, 1991.

- 1. This is an application for certification.
- 2. The applicant had not previously been found to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* (the "Act"). On the first day of hearing the panel heard the parties' evidence and submissions with respect to that issue and on March 22, 1991 the panel ruled that it was satisfied that the applicant was a trade union within the meaning of the Act.
- 3. The next issue concerned the description of the bargaining unit. The applicant (the "trade union", or the "Federation") seeks to represent all registered and graduate nursing assis-

tants employed by the respondent in Mississauga save and except Assistant Unit Administrator, and persons above the rank of Assistant Unit Administrator.

- 4. The respondent's position initially was three-fold. First the respondent (the "hospital") sought to exclude any reference to the term *graduate* nursing assistant. Secondly, the respondent argued that the bargaining unit sought by the applicant is not an appropriate unit in that it is restricted to nursing assistants. It is the position of the respondent that an appropriate bargaining unit would be what will be referred to as the "service" unit. Thirdly, the respondent argued that an appropriate bargaining unit would consist of a full-time employee bargaining unit and a separate part-time employee bargaining unit.
- 5. It is the position of the intervener (the "Steelworkers") that the bargaining unit sought by the applicant is an appropriate bargaining unit.
- 6. At the outset of the hearing the respondent agreed to include "graduate" nursing assistants in any description of an appropriate bargaining unit. The parties were agreed that the panel should proceed to hear the issue of whether or not the applicant's proposed bargaining unit, described as one including only registered and graduate nursing assistants ("RNA's"), was an appropriate bargaining unit description. They were further agreed that any issue about whether the bargaining unit should be structured as two separate units including full-time and part-time employees respectively should await the outcome of the first issue. This decision then deals only with whether the applicant's proposed bargaining unit described to include only registered and graduate nursing assistants (the "RNA" unit) is an appropriate bargaining unit description.
- 7. On the final day of hearing the panel received a letter from the Service Employees International Union seeking leave to intervene in the proceedings. No one appeared at the hearing on that day in support of that request, although it is not apparent that the trade union had notice of the hearing date. The panel provided the parties with a copy of the letter and indicated that it was not prepared to adjourn the proceedings on the basis of the representations contained in the letter, but that a copy of any decision would be forwarded to that trade union.
- 8. The respondent is a full service community hospital employing approximately 2300 employees. Currently there are two groups of employees represented in collective bargaining. The first is a group of stationary engineers (a bargaining unit of approximately 6 employees). In addition there is a full-time and a separate part-time bargaining unit of laboratory employees. This latter group comprises approximately sixty employees in total and is represented by the Ontario Public Service Employees Union. The bargaining units proposed by the respondent (full-time and part-time) would cover more than 500 employees including approximately 165 RNA's. The job classifications included in the respondent's proposed units are beltline checker, carpenter, cleaner, cook I, dietary aide-cafeteria, dishmachine operator, electrician, instrument aide-operating room, maintenance mechanic, operating room technician, orderly, orthopaedic technician, painter, plumber, porter, printer, S.P.D. assistant, sanitation aide, storeskeeper, storesperson, and unit aide.
- 9. In 1990, the Steelworkers applied to be certified for the service unit (as proposed by the respondent herein). That application was opposed by a group of RNA's. A pre-hearing representation vote was held. The Steelworkers were not successful in obtaining majority support and the application was dismissed. At that time the RNA's opposing the application took the position that they lacked any community of interest with the other employees in the proposed bargaining unit.
- 10. Following the Steelworkers unsuccessful application, the hospital retained a consultant to inquire into and report to the hospital with respect to the employment concerns of those

employees in the service unit. By virtue of a decision of the nursing advisory committee (made up of members of management responsible for the nursing division of the hospital) those employees who reported through nursing division were not included in the consultation. The members of the nursing advisory committee felt that communications with the employees in this division were good and that their participation in the consultation was unnecessary. That consultation did take place and a report was provided to the hospital. It sets out at some length the apparent sources of dissatisfaction within the service group including the identification of priorities and recommendations for change. A recommendation to create a service group staff committee excludes anyone from nursing division.

- 11. Of those classifications included in the hospital's proposed service unit, six report through the hospital's nursing division. They include instrument aide O.R., orderly, orthopaedic technician, operating room technician, unit aide, and RNA's. While the report of the consultant indicates that only the RNA staff did not participate in the survey these other employees were not consulted either.
- 12. Since July 1988 the hospital has recognized a formal organization of RNA's. The group's mandate is to raise and discuss any issues concerning their employment within the hospital. The group holds monthly meetings at which time a member of nursing management is present. Following each meeting a representative of the group and a representative of management meet to review and discuss any issues that have been discussed at the group meeting. The RNA group has formulated and presented wage and benefit proposals for RNA's at the hospital, has intervened on behalf of an RNA who had lost her job, and has had input into the development of the job description for the RNA position. Currently it would appear that the hospital also recognises a similar group for registered nurses ("RN's") and a Unit Administrator group (persons who are excluded from the *Labour Relations Act* by virtue of the exercise of managerial functions). Although the evidence is not clear, it would appear that the hospital may recognize or is in the process of recognizing certain other groups of employees with a similar mandate.
- 13. The hospital operates from the concept referred to as total patient care. This concept recognizes that a patient presents with more than simply one particular physiological or psychological problem and care is provided on a multi-disciplinary basis. Those individuals that would normally fall within a paramedical bargaining unit such as physiotherapist, occupational therapist, speech and language therapist, or respiratory therapist are all available to each unit in the hospital to perform an assessment of the patient particular to their specialty and to work in a collaborative team setting with the physicians and nurses to ensure the optimum treatment and care of the patient.
- The applicant is a newly created trade union organized to represent all registered practical nurses or registered nursing assistants and other allied personnel eligible for collective bargaining in Ontario. Over the years at various health-care institutions local organizations of registered nursing assistants have been created. However this would appear to be the first organization of RNA's which would purport to encompass the provincial jurisdiction. The history leading to the creation of the applicant follows somewhat the development of trade union representation of nurses in Ontario. The Ontario Association of Registered Nursing Assistants (OARNA) has existed to represent the professional interest of RNA's in the province for some time. The employment of individuals as RNA's (or certified nursing assistants) has existed since the late 1930's and over the years standards and criteria have been developed with respect to education and the performance of the work. In 1963 the College of Nurses of Ontario was created to formulate and regulate the standards of practice of both nurses and nursing assistants in Ontario. Over the years within OARNA there has been considerable discussion about the creation of a separate trade

union entity to represent RNA's in collective bargaining. Just one example occurred in 1980 when a group of RNA's sought legal advice through the auspices of OARNA as to the likelihood of obtaining representation rights for a bargaining unit comprised solely of RNA's. They were advised that their chances were not good in light of a number of earlier decisions of the Board to that effect.

- RNA's expressed opposition to the Steelworkers campaign at Mississauga Hospital on 15. the basis that they did not feel they had issues in common with the other employees in the service unit. While some of this was based on the view that they are "professionals", there is also a sincerely held belief that issues of their own concern have not been adequately represented as part of the larger service unit. More recently, there have been changes in the Standards of Practice formulated by the College of Nurses of Ontario resulting in RNA's performing some tasks previously performed only by RN's. The focus of the standards has shifted to recognize that the RN and RNA, while working interdependently in the provision of health care, also work independently. The standards are now structured to outline the minimum skill expectations of RNA's and RN's while also recognizing that individuals may perform at a higher skill level where appropriate. Currently a major review of the legislation applicable to the self-regulating health care professions is underway. Representatives of the applicant anticipate that new legislation will recognize additional self-regulating health care professions (for example, midwifery) and will rationalize the legislation currently affecting others. In combination these factors have increased the RNA's appetite for collective bargaining outside the service unit and through the auspices of their own trade union and the Federation was created in February 1991.
- The parties do not dispute that the employees in the bargaining unit proposed by the applicant share a community of interest. They are all employed in the same job classification, perform similar if not identical tasks, share the same working conditions, and the same terms and conditions of employment. RNA's are employed on 16 of 25 units in the hospital. By and large RNA's are not employed in speciality areas such as the emergency room, the intensive care unit or the recovery room. In these areas the condition of the patient is such that the skills necessary for care are those held by RN's. RNA's are assigned to units in both acute and chronic care areas in the hospital. They receive a patient assignment and are responsible for the care of the patients, including the ongoing nursing assessment and the implementation of the nursing care plan in effect for that patient. Depending on the condition of the patient, an RN and RNA may both be assigned to their care. There is a small pool of RNA's who float between units as required to cover absences.
- The evidence relating to the issue of the community of interest of the RNA's with other employees in the employer's proposed bargaining unit focussed on the other classifications also included within the nursing division (see paragraph 11). The hospital is organized into six areas of responsibility. The nursing division reports to the Vice President of Patient Care. The human resource, communication and educational services for the hospital report through the Vice President of Human Resources. The Dietetic Services including the kitchen staff report directly to the President of the hospital. The diagnostic, laboratory and paramedical services report through the Executive Vice President. Included in that area are those employees who would usually come within a "lab tech" bargaining unit or a "paramedical" bargaining unit in the hospital sector. The materials management division of the hospital includes the printing, portering and stores services which report through the Vice President of Finance. Finally, the Facilities Management Department includes the construction and maintenance services for the hospital and reports through the Vice President of Ambulatory Care. Apart from those employees who report through the nursing division there was no evidence to suggest that the skills of other employees in the proposed service unit were similar to the skills utilized by the RNA's. The terms and conditions of employment are only somewhat different, for example, the RNA's are employed on a twenty-four hour basis

whereas the construction and maintenance employees are employed on the day shift only. The reporting structures differ as set out above.

- 18. The evidence with respect to those classifications reporting through nursing division discloses the following. The qualifications for orthopaedic technician indicate that the RNA qualification is an asset. The qualifications for operating room technician require the RNA qualification plus additional training. Six or seven orderlies are employed in the hospital. Three are employed in the emergency department where no RNA's are employed. It would appear that two orderlies are employed on psychiatric units in the hospital and that on those units the orderlies have a patient assignment and do have some responsibility for charting as would both RN's and RNA's. There is also at least one orderly employed on a chronic care unit. The use of orderlies in the hospital has declined. Orderlies are supervised by the RN on duty or the Unit Administrator. Orderlies are not self-regulating. Their responsibility is to the employer who monitors performance and sets standards and expectations for care. The hospital employs approximately six unit aides to perform support tasks for the RN's and RNA's on the units.
- 19. The evidence supports the conclusion that there is some overlap of function among the RNA's, orderlies, and RN's. There are also certain overlaps in function among the RNA's, the unit clerks, and the RN's. It was agreed by the parties that the position of unit clerk was a clerical position and would fall outside either proposed bargaining unit. Unit clerks are available on various units in the hospital for the purpose of transcribing doctor's orders, contacting various support disciplines and completing other paper work.
- 20. It was the position of the applicant that the test for an appropriate bargaining unit is one of viability. The applicant asserted that the evidence in this case supports the conclusion that a bargaining unit of RNA's is viable. It pointed to the fact that the hospital already recognizes an RNA group with whom it deals in respect of terms and conditions of employment. Furthermore the hospital acknowledges a separate community of interest of those employees who did not participate in the consultant's survey and report following the defeat of the Steelworkers organizing attempt in 1990. In addition, the applicant relied on a number of collective agreements filed as exhibits wherein the bargaining unit is described as including only RNA's. The applicant challenged that there is any community of interest between RNA's and other classifications of employee within the service unit and points for example to the classifications of plumber, cook, dietary aide, electrician and painter. The applicant does not deny that there is a community of interest between the RNA's and the orderlies but argued that it is insufficient to conclude that the RNA's share a community of interest with the larger service group proposed by the respondent. The applicant argued that the RNA group on its own is sufficiently viable that while they may have a community of interest with other employees it is insufficient to deny them the bargaining unit that they seek.
- The applicant argued that in reviewing the Board's cases there are three reasons that have been given to support the inclusion of RNA's in the service unit. The first reason is history. The second is reference to community of interest and the third is a desire to avoid fragmentation. The applicant reviewed each of those reasons and commented that with respect to history, the decision in *Hospital for Sick Children supra* acknowledged that the rationale for that history is not entirely clear. The applicant referred to the decision in *Toronto General Hospital* [1972] OLRB Rep. Jan. 33 where the Board found an all employee bargaining unit excluding RNA's to be appropriate based on the agreement of the parties and on the history of collective bargaining at that institution.
- 22. With respect to avoiding undue fragmentation the applicant argued that the decisions reveal four underlying concerns. The first is to avoid a multiplicity of bargaining units and conse-

quent disruption for the employer. The applicant argued that by virtue of the fact that the parties' bargaining relationship is governed by the Hospital Labour Disputes Arbitration Act disruption is not an issue because the process of negotiations is, if necessary, resolved through interest arbitration. The second reason behind the aversion to fragmentation is to avoid restricting job opportunities between small bargaining units. The applicant argued that this is not an issue in this case as there is no interchange of RNA's into other classifications, nor employees into the RNA group given the particular nature of the qualification and training. A third reason to avoid fragmentation is to avoid jurisdictional disputes. The applicant argued that to the extent there is potential for jurisdictional disputes it is with the nurses and that potential would exist in any event. The respondent conceded that the nurses would constitute a separate bargaining unit. The fourth reason underlying the fragmentation argument the applicant asserted is the administrative convenience for an employer, that is, to avoid having to deal with a number of bargaining agents and at different times. The applicant argued that in this case the evidence supports the conclusion that the human resources group deals with both union and non-union groups already and there is no evidence that this hospital has had any difficulty or contemplates difficulty merely if the applicant were certified. The applicant relies on the fact that the hospital has already recognized a formal RNA group in an organized structure within the hospital.

- 23. Finally the applicant argued that the Board has a broad discretion under section 6(1). The search is not for the most appropriate bargaining unit. It points to the discussion in the *Hospital for Sick Children supra*, decision. The applicant also relies on section 3 of the Act and the Board's recognition that there is some weight to be given to the right of self-determination of the employees, and that an inference can be drawn from the fact of the application made that the employees concerned have chosen the applicant as their bargaining agent.
- In support of the applicant's position, the intervener argued that there is no undue fragmentation associated with the applicant's proposed bargaining unit. It argued that the RNA's have a distinct community of interest from others in the service unit. The RNA's have an ongoing relationship with patients and their employment is care oriented whereas other employees provide support services to the hospital and as such are task or service oriented. The intervener submits that if the inclusion of RNA's in a service unit is as a result of a historical anomaly and the manner in which bargaining has developed then that ought not to prevent the applicant from seeking this unit at this point in its history.
- In response the employer accepts that the RNA's have a community of interest. The 25. respondent however relied on the history of the Board placing RNA's in the service unit and argued that there is a heavy onus on an applicant seeking to depart from a long standing practice of the Board, particularly in light of the Board's aversion to fragmentation. The respondent argued that avoiding disruption in the workplace by minimizing the multiplicity of bargaining units continues to be a factor notwithstanding that the parties are subject to the Hospital Labour Disputes Arbitration Act. The respondent also argued that individuals in the positions of orthopaedic technician or operating room technician who have an RNA background may have their job opportunities limited if transferring between an RNA bargaining unit and a separate service unit. In addition, the respondent pointed to the fact that persons employed in the position of operating room technician or orthopaedic technician could be individuals holding the qualification of RNA. If such an individual was included in the bargaining unit sought by the applicant and was working with a technician without the qualification, the respondent would be placed in the position of dealing with employees in the same classification where one was represented by a trade union and the other not. Counsel for the applicant acknowledged that such an individual would be included in the bargaining unit as described by the applicant and that the applicant was willing to represent such an individual. The evidence of Gail Bennett on behalf of the applicant indicates that in its organizing

the applicant did not seek to represent these individuals but only those individuals employed as RNA's by the hospital. It would clearly not be appropriate to include individuals holding the RNA qualification but employed in a different capacity in a bargaining unit of RNA's for the reasons expressed by the respondent.

- The respondent pointed to the overlap in function between the work performed by ord-26. erlies and RNA's as evidence of potential jurisdictional difficulties (although the respondent does not dispute the proposition of the applicant that the classification of orderly is a declining role in the hospital). The respondent points to a community of interest existing between the RNA's and the other classifications of employee that report through the nursing division of the hospital. The respondent argued that any comparison of the level of patient care is not an appropriate criteria in determining the appropriateness of the bargaining unit in that the concept appears to mean different things to different people. The respondent pointed to the fact that other employees in the hospital also perform direct patient care (such as paramedical employees). The respondent argued that no conclusions could be drawn from the fact that the nursing advisory committee decided not to participate in the consultant's survey. In essence, the respondent argued that there is no new or sufficient evidence to indicate that the Board should depart from its previous practice of finding that the service unit proposed by the respondent is an appropriate bargaining unit and a finding that an unit of only RNA's is inappropriate. The respondent suggested that to do otherwise would be a clear signal to the labour relations community that bargaining unit configurations would no longer have some predictability and would not fulfil the Board's public policy role.
- Underlying the parties' positions in this case is the recognition that in the hospital sector the Board has, with some consistency, recognized a number of particular bargaining units as appropriate. These bargaining units are generally described as registered and graduate nurses, the service group (or all-employee unit), the paramedical unit, the stationary engineers, and office and clerical employees. The Board has historically treated the RNA's as being included in the service unit. That inclusion has most recently been discussed in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266. That decision would appear to both help and hinder the applicant in the instant case. There, the Canadian Union of Public Employees ("CUPE") filed an application for certification seeking to represent a bargaining unit of hospital "service" workers. The applicant included RNA's in its proposed bargaining unit. In response, the hospital proposed a bargaining unit that included employees in the "service" unit and in addition, paramedical and technical personnel. After lenghty proceedings the Board issued its decision and set out the concerns and approach of the Board in the exercise of its discretion in fashioning bargaining units. It will be useful to quote at some length from that decision:

Determining the Appropriate Bargaining Unit - In General

- 12. Prior to the passage of collective bargaining legislation in the early 1940's, there was no prescribed mechanism for the acquisition of bargaining rights. If a group of employees sought to form or join a trade union, and if they had sufficient bargaining power, they were able to compel their employer to meet and bargain. However, the only means of achieving recognition was to threaten a strike. A union had no statutory right to bargain on behalf of its members, and no statutory obligation to represent anyone else. Even if a bargain was struck, the agreement was not, in itself, a binding and enforceable contract. Its enforceability depended upon the parties' economic strength.
- 13. In 1943, borrowing from American experience, the Legislature passed the *Ontario Collective Bargaining Act* (S.O. 1943, c.4). The new legislation provided a process whereby a trade union could become the exclusive bargaining agent for the employees in a "unit of employees… appropriate for the purposes of collective bargaining" which could be an "employer unit, craft unit, plant unit, or a subdivision thereof" (see section 13(5a)). Over the years, that language has

not changed very much. Section 1 and 6 of the present Labour Relations Act read (in part) as follows:

6.-(1) Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

1.-(1) In this Act,

. . .

(b) "bargaining unit" means a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them.

14. It will be seen that the statutory language has remained basically unchanged for more than four decades, and in the early years it provided the basis for making board distinctions for bargaining unit purposes between such groups as: "white collar" office and technical employees, and "blue collar" production employees; skilled tradesmen (electricians, plumbers, sheet metal workers, etc.), and unskilled or semi-skilled workers; part-time employees and full-time employees; employees working for an employer in one plant or municipality and employees in another plant or municipality; and so on. However, these fairly simple, and then unexceptional distinctions, do not apply so easily today. Collective bargaining has extended beyond its traditional "blue collar" industrial base, into the public sector and to increasingly sophisticated and diverse job hierarchies. Real life collective bargaining experience has outstripped some of the conventional wisdom and has shown that the collective bargaining system can exhibit quite a variety of structures, which, at one time, parties might have considered unconventional or inappropriate. Ontario Hydro, for example, has a province-wide bargaining unit, encompassing a broad range of employee classifications, and thousands of employees, ranging from unskilled workers to highly trained technicians. A typical municipal "inside workers" (white collar) bargaining unit may include occupations ranging from filing clerks, to computer programmers, economists and planners with a considerable amount of post-secondary or even graduate training [see the Board's decision in The Regional Municipality of Durham, Board File 1818-84-R, decision released November 20, 1984]. The Ontario Civil Service bargaining unit contains thousands of employees ranging from clerks and typists to sophisticated scientific and technical personnel - and, incidentally, the staff of a number of provincial psychiatric hospitals (see: Owen Sound General and Marine Hospital, [1978] OLRB Rep. May 445, where the Board noted that in the government sector nurses, paramedicals, service employees, and clericals are all in the same unit, even though under the Labour Relations Act, they have typically been segregated into separate units). While at one time common opinion and industrial relations practice might have supported fairly rigid (almost "class") divisions between employee groups, modern collective bargaining seems to be able to thrive quite well in many contexts without such rigid distinctions. It is no longer as easy as it once was to say that it is "inappropriate" to group together for collective bargaining purposes, employees with quite diverse skills, education, training, position in the job hierarchy or probable aspirations.

15. Now obviously, the determination of the appropriate bargaining unit has immense practical and tactical significance. The unit determines the constituency within which the union must establish majority support if there is to be any collective bargaining at all. To put it another way, the unit determines the group of employees whose support must be solicited by their fellows if the objective of collective bargaining is to be achieved. A union cannot seek certification solely for those who have opted to join it. It is required by law to establish majority support in what this Board determines is an appropriate unit, and that may not be so easy to predict - as the present case indicates. Moreover, to the extent that the contours of the bargaining unit are unclear, there will be uncertainty about precisely how employees should go about organizing themselves in order to conform with what the law may require. There will also be the prospect of litigation, cost, and delay which may prejudice both the applicant union and the employees it seeks to represent (see the remarks of Laskin, J.A. in Nick Masney Hotels Limited, (1970) 13 D.L.R. (3d) 289; 70 CLLC 26 14,010; and those of Estey J. A. (as he then was) in Re Journal

Publishing Co. of Ottawa et al., and Ottawa Newspaper Guild et al. [1977] 1ACWS 817). Cost and delay will also be of concern to the employer, and to employees whose wages may be temporarily "frozen" by section 79 of the Act even if they are ultimately excluded from the bargaining unit. The situation is exacerbated in the instant case where the bargaining unit is large, and both parties have experienced some difficulty determining the precise perimeter of the unit, and how (if at all) it can be meaningfully and consistently distinguished from the lower levels of employees working normally (in the employer's terms) in "technical" job classifications.

16. Ideally, the determination of the bargaining unit should involve an informed exercise of the Board's judgement, based upon objective criteria, industrial relations experience, and a sensitivity to the statutory objects. Ideally, it should be a dispassionate enquiry focusing on what is sensible, workable and, in short, "appropriate". However, the Board cannot ignore the fact that in an adversarial model, unions and employers may both be tempted to frame their submissions with an eye to advancing, delaying or avoiding the objective of collective bargaining. That was an undercurrent in both parties' arguments from time to time. A union may seek to tailor its proposed unit in terms of its established supporters. An employer may seek to exclude pockets of likely union supporters, or argue for the inclusion of those whom the union may not have organized, or who are unlikely to have been receptive. And employers may even be tempted to raise bargaining unit issues as a means of delaying the certification application and interrupting the momentum of the union's organizing drive - particularly if there is to be a representation vote. A graphic example of these pragmatic/tactical considerations can be found in York Steel Construction Limited, [1980] OLRB Rep. Feb. 293, where the union initially sought a unit covering only the larger of two plants which an employer operated in a municipality. The employer asserted that the bargaining unit should cover both plants. Following a representation vote, it became known that the ballots cast in the larger plant gave the union a sufficiently wide margin that it could obtain bargaining rights for both plants, regardless of how the smaller plant had voted. The parties promptly reversed their positions. Such purely tactical considerations merely complicate the Board's task in particular cases.

17. Given that the definition of the bargaining unit can materially affect the ability of employees to organize, and that uncertainties concerning its contours can provoke costly litigation and potentially prejudicial delay, what then is the purpose of the concept of the "appropriate bargaining unit"? Quite simply, it is an effort to inject a public policy component into the initial shaping of the collective bargaining structure, so as to encourage the practice and procedure of collective bargaining and enhance the likelihood of a more viable and harmonious collective bargaining relationship. That objective is spelled out clearly in the Preamble to the Act. While the requisites for effective collective bargaining cannot always be defined with certainty, may necessitate a balance of competing collective bargaining values, and may, in any event, turn on factors beyond the Board's control, the discretion to frame the "appropriate" bargaining unit during the initial organizing phase provides the Board with an opportunity (albeit perhaps a limited one) to avoid subsequent labour relations problems. Now, of course, this is not necessarily the same thing as minimizing administrative problems for the employer or organizing problems for the union. The structures and policies that promote a maximization of the employer's business interests are not those that will necessarily describe a viable bargaining unit, or the only viable bargaining unit - particularly since those interests may include a desire to avoid collective bargaining altogether, or limit its effectiveness. The employer's administrative structures are relevant in determining the bargaining unit, but they are not necessarily to be taken as the conclusive blue print in deciding what is appropriate. Nor is it a matter of simply giving an applicant union what it wants. It is, as we have noted, a matter of balancing competing considerations, including such factors as: whether the employees have a community of interest having regard to the nature of the work performed, the conditions of employment, and their skills; the employer's administrative structures; the geographic circumstances; the employees' functional coherence, or interdependence or interchange with other employees; the centralization of management authority; the economic advantages to the employer of one unit versus another; the source of work; the right of employees to a measure of self-determination; the degree of employee organization and whether a proposed unit would impede such organizations; any likely adverse effects to the parties and the public that might flow from a proposed unit or from fragmentation of employees into several units, and so on.

18. Some of the collective bargaining consequences of the bargaining unit determination were canvassed in *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. March 481. In that case, the applicant

was seeking to represent a "craft" unit of about 100 certified electricians who were part of a maintenance department of 800 employees and an industrial work force of 2,800, all of whom were unorganized. The Board made the following general observations about the potential significance of a bargaining unit determination:

50. We may begin by observing that the notion of an "appropriate" bargaining unit is a labour relations concept with no common law antecedents and in the general case, no precise statutory definition. What it means, quite simply, is the group of employees whom it makes "labour relations sense" to lump together for the purpose of collective bargaining, and section 6(1) of the Act leaves the Board's discretion to fashion bargaining units largely unfettered. Yet the Board's determination is obviously of immense practical importance, not only for the immediate parties, but for the structure and performance of the collective bargaining system as a whole. The definition of the unit affects the bargaining power of the union and the point of balance it creates with that of the employer. It influences the potential scope and effectiveness of collective bargaining for dealing with different matters, and to some extent, even the substantive issues covered in the collective agreement. And, perhaps most important, the shape of the bargaining unit can profoundly influence the potential for industrial peace or collective bargaining discord. The more disparate are the interests enclosed with the unit, the more difficult it may be for the union to effectively represent the collectivity. Insufficient attention to these special interests generates internal strife, while too much attention to minorities may make it more difficult for a union to formulate a coherent package of proposals or make necessary concessions. On the other hand, there are dangers at the other extreme, as the Board noted in Bestview Holdings Limited, [1983] OLRB Rep. Aug. 1250:

> 28. Self-determination and community of interest often favour relatively small units, but these are not the only relevant factors in bargaining unit design. The Board must also strive to create a viable structure for ongoing collective bargaining and, to this end, undue fragmentation must be avoided. Consolidated bargaining offers several advantages over a fragmented structure. A proliferation of small units may result in unnecessary work stoppages. Each time one group goes on strike, other employees performing jobs that are functionally dependent upon the work normally done by strikers are brought to a halt. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work. The likelihood of a strike occurring increases as the number of rounds of bargaining grows, and is further enhanced by competition among bargaining agents. Secondly, each of several units typically becomes a separate seniority district, enclosed by walls which impede the movement of employees between jobs. In addition, broader-based structures may lower the cost and thereby increase the availability of insurance schemes and benefit plans. A multiplicity of bargaining units also inevitably spawns jurisdictional disputes over the assignment of work and entails to cost of negotiating and applying several collective agreements. Finally, the existence of a single bargaining unit facilitates equitable treatment of employees doing similar jobs. A patchwork quilt of bargaining units is a receipt for industrial unrest - if only because in an integrated enterprise it takes only one collective bargaining breakdown to start the whole system unravelling.

The comments in *Kidd Creek* illustrate some of the problems which could arguably arise in some settings from an unduly fragmented bargaining structure - even if the group of employees who sought to organize themselves did indeed share a distinct or itentifiable community of interest.

19. Some of the same concerns underly the Board's analysis in *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459, which involved an attempt by two unions to organize differently described but overlapping units of paramedical employees. The initial problem was the description of the appropriate bargaining unit. The Board recognized that in the special environment of a public hospital pharmacists, physiotherapists, social workers, etc. all had an arguably distinct identity stemming from such factors as their specialized training, outside professional or quasi-professional associations, and particular departmental focus. In this sense, each sub-group and

each department could claim a distinct community of interest. However, the Board made it clear that this did not mean that each of these groupings, would constitute a separate bargaining unit for collective bargaining purposes. Such balkanization of bargaining would create serious administrative problems for the Hospital. Nor, for reasons set out at length, was the Board persuaded that technical, paramedical, paraprofessional and professional employees could, or should be distinguished for collective bargaining purposes, even though there were obviously important distinctions between the various sub-groupings based upon their level of education, responsibilities, degree of independence, and how far they had travelled on the "road to professionalization". The Board was of the view that for collective bargaining purposes, they could all comfortably co-exist within one paramedical bargaining unit.

- 20. In Kidd Creek (and Stratford General Hospital. to a lesser extent), it was suggested that an inappropriate or unduly fragmented bargaining structure could contribute to subsequent labour-management problems, tension within and between bargaining units, and an escalation if industrial conflict. Such outcomes are undesirable. If these problems can be avoided by more careful attention to the determination of the bargaining unit "at the front end", without prejudicing other collective bargaining or statutory objectives, then that attention is obviously warranted. On the other hand, if the potential for collective bargaining difficulties is less obvious or serious, or if the possible problems are less certainly connected with one bargaining unit definition as opposed to another, or if similar problems are likely to arise wherever the line is drawn, then the precise perimeter of the bargaining unit may be less important from a policy point of view.
- 21. None of this is new of course. The Board has long recognized that the structure and appropriateness of a bargaining unit cannot be determined with scientific precision. In any given situation there may not be only one uniquely appropriate bargaining unit. Quite the contrary. As we have already noted, the institution of collective bargaining has shown itself capable of accommodating a variety of bargaining structures, even in broadly similar circumstances, and in particular situations there may be several alternative and equally appropriate ways of framing the bargaining unit description. There may be varying degrees of "appropriateness", with one or more unit descriptions being appropriate, even though some other (usually more comprehensive) bargaining unit might also be appropriate. For example, a single plant unit may be appropriate but so may a multi plant unit. Full time and part time employees can be segregated, but there are many situations where they have not been. This reality was discussed in the *Board of Education for the City of Toronto*, [1970] OLRB Rep. July 430, in a long passage to which we might usefully refer, and which also contains a review of the mechanics of the certification process.

. . .

- 17. After sifting the various facts the Board must determine "the unit of employees" that is appropriate having regard to the particular situation then before the Board. The only fetters on the Board's discretion to make a determination are the requirements contained in section 6(1) that the "unit shall consist of more than one employee", Albert Fuel Limited, 1969 October 3, Board File No. 16685-69-R, and that the unit of employees is appropriate for collective bargaining there are no other requirements. The unit that is appropriate is the unit that emerges after all the facts have been considered.
- 18. The fact finding process is at all times directed toward and governed by the concept of appropriateness and the essence of appropriateness in the context of labour relations is that the unit of employees be able to carry on viable and meaningful collective bargaining relationship with their employer. It is the Board's experience that employees may in some cases subdivide themselves into small groups which may result in an unnecessary fragmentation or automization of the employees. Thus an employer faced with the possibility of lenghty, protracted and expensive bargaining and the further possibility of jurisdictional disputes among multiple bargaining groups represented by one or more trade unions may find it impossible to carry on a viable and meaningful collective bargaining relationship. The Board therefore is adverse to certifying employee groups where the result is undue fragmentation and in those circumstances the Board will find the unit proposed inappropriate on the basis that a meaningful and viable collective bargaining relationship will not result. See e.g. Waterloo County Health Unit, 1969 January OLRB Mthly Rep. 1016.

- 19. In finding appropriate bargaining units the Board must also be cautious that its determination as to what is appropriate will not impede the right of self-organization guaranteed in section 3 of the Labour Relations Act. The National Labour Relations Board in the United States has recognized in certain cases that its determination of appropriate bargaining units has "operated to impede the exercise by employees... of their rights of self-organization...". Save-on-Drugs Inc. 138 NLRB 1032 (1961); see also Quaker City Life Ins. Co., 134 NLRB 960 (1961). While great weight must be given to prior cases dealing with similar situations, those cases are not dispositive of the issue in any given case. Bargaining unit determination requires a case by case review of the facts and this is compelled by the working of section 6(1) which provides that the Board "Upon an application... shall determine the unit of employees that is appropriate for collective bargaining,...".
- 20. It is readily apparent why plant units, or office and sales units are appropriate as a subdivision of an employee unit. There are however, cases where the lines of demarcation are not so readily apparent and that is particularly so in areas apart from private industry. For example, in the Canadian Union of Public Employees v The Governors of the University of Toronto February 1969 OLRB Mthly Rep. 1149; June 1969 OLRB Mthly Rep. 334, the applicant proposed a bargaining unit for all non-professional employees of the respondent in those libraries that fall within the jurisdiction of the University of Toronto Library while the respondent submitted that the appropriate bargaining unit was one encompassing all non-academic employees of the University of Toronto. The Board concluded that the non-academic or non-professional employees of the University Library was an appropriate bargaining unit. In that case a bargaining unit composed of all non-academic employees would also have been appropriate, and perhaps more appropriate as a subdivision of an employer unit. In arriving at its determination the Board was simply fact finding for the purpose of determining and describing an appropriate unit and as such considered the employer's organization and the extend of organization of employees with other factors. It was not choosing between or among appropriate units or more or most appropriate units. Its fact finding was governed simply by what in all the circumstances was appropriate. That is a process that is carried on in many of the situations confronting this Board in making bargaining unit determinations.
- 21. The Board's process therefore in determining appropriate bargaining units is not directed to certifying the more or the most appropriate bargaining unit The Labour Relations Act only requires that the unit of employees be appropriate; the Act does not require labour organizations to seek representations in the most comprehensive or optimum groupings unless such groupings constitutes the only appropriate unit. *C.F. Federal Electric Corp.* 157 NLRB 89 (1966); *Bagdad Copper Company* 144 NLRB 1496 (1963).
- 22. In conclusion we hold that where section 6(1) refers to "the unit of employees that is appropriate" it does not impose any requirement that the Board choose the more or most comprehensive unit it only requires the Board to determine the unit of employees that is appropriate for collective bargaining having particular regard to the facts of the immediate application.

[emphasis added]

- 28. Having set out the general framework for the Board's exercise of discretion with respect to bargaining unit configurations, the decision then recounts the submissions of a group of RNA's opposing their inclusion in the bargaining unit sought by CUPE, and concludes:
 - 34. ... While it was sometimes difficult to distinguish her submissions respecting the bargaining unit configuration from those indicating opposition to unions per se, it is fair to say that the thrust of her argument was that the community of interest of the RNA's lay more with that of the RN's than with the members of the service bargaining unit.

. . .

- 36. While the Board does not in any way wish to minimize Ms. Barclay's concerns about the recognition of the "professional status" of the RNA's, the question before the Board involves the determination of an appropriate bargaining unit which reflects and will establish a viable collective bargaining structure. Protecting or promoting one group's claim to "professional recognition is not a dominant concern, nor is this Board's opinion respecting an employee's claim to "professional" status have much to do with the determination of an appropriate bargaining unit in this context at least. Ms. Barclay's submissions must be weighed against the well-established collective bargaining practices in public hospitals across Ontario: for the purpose of collective bargaining, RNA's have regularly and routinely been included in the service bargaining unit, even though there might be a plausible claim to group them together with RN's or perhaps with paramedical/technical employees.
- 37. The precise rationale for this established practice is not entirely clear, and may have more to do with the historical evolution of collective bargaining in the health care sector than any calculated assessment of what would ultimately be the most rational "shape" for the collective bargaining structure. Registered nurses had an early and active appetite for collective bargaining through an organization (the Ontario Nurses' Association - "ONA") which catered exclusively to the interests and concerns of their own professional group. ONA was not interested in, or able under its constitution to represent anyone other than registered nurses, and, at the time, the role of the RNA may not have been as developed, defined, or regulated as it is today. RN's were regularly given their own separate bargaining unit. So it is today. While, in retrospect, and with the benefit of hindsight, RNA's might conceivably have been included in a bargaining unit with RN's or, alternatively, in a unit of paramedical employees (who typically organized, if at all, much later), the fact is that they were grouped together with nurses' aides, orderlies, and other employees without established professional standing. There is no evidence to indicate that this determination produced any collective bargaining or administrative difficulties, even though the result has been that for years and in numerous hospital situations RN's and RNA's working side by side have been in separate bargaining units. Indeed, the historical treatment of RNA's merely underlines the difficulties with the proposition that there is always and necessarily only one uniquely suitable "unit of employees appropriate for collective bargaining".
- 38. Human institutions are a product of their history. Collective bargaining institutions are no exception. It is now too late to say that the RNA's should not or cannot be appropriately included in the "service" bargaining unit. The overwhelming weight of established collective bargaining practice suggests precisely the opposite conclusion. Accordingly, despite Ms. Barclay's submission, the Board is not disposed to exclude RNA's from the service unit which the union seeks to represent.
- Determining an appropriate bargaining unit in any given case requires the balancing of 29. various factors. In this case the applicant is seeking a bargaining unit restricted to one classification of employee, something the Board has historically sought to avoid. RNA's do not enjoy the benefit of section 6(3) of the Act so as to be described as a craft unit. Their history of bargaining has been with other groups of employees (see Essex Health Association [1967] OLRB Rep. Nov. 716 and Toronto East General and Orthopaedic Hospital [1967] OLRB Rep. Apr. 54). In the hospital sector particularly a number of bargaining units have developed that are now fairly well established and well known. In a number of cases the Board has commented on the inclusion of RNA's in the service unit and has concluded that RNA's are appropriately included in the larger service unit. Where an applicant trade union has sought to include RNA's in the service unit over the objection of the employer or where the trade union and employer have agreed to include RNA's in the service unit over the objection of RNA's, the Board has generally included RNA's in the service unit (see for example Altamont Nursing Home [1971] OLRB Rep. July 361; Toronto East General and Orthopaedic Hospital [1967] OLRB Rep. Apr. 54; Smiths Falls Public Hospital [1973] OLRB Rep. July 394; and The Hospital For Sick Children, supra). There have however been situations where through various circumstances RNA's have not been included in the service unit (see for example McKellar General Hospital [1971] OLRB Rep. Jun. 312; The Wellesley Hospital [1974] OLRB

Rep. Jan. 55; Toronto General Hospital [1972] OLRB Rep. Jan. 33. But see in Riverside Hospital of Ottawa [1971] OLRB Rep. Jan. 10 where the majority of the Board, Vice-Chair O'Shea dissenting, did not accept the agreement of the parties to exclude RNA's from an all employee bargaining unit).

- 30. In both Essex Health Association [1967] OLRB Rep. Nov. 716 and St. Joseph's General Hospital [1968] OLRB Rep. Sept. 558 the Board specifically declined to find that a unit of RNA's was appropriate. We will review both decisions.
- In St. Joseph's General Hospital supra, the Lakehead Registered Nursing Assistants 31. Bargaining Association was applying to be certified for bargaining units comprised of RNA's. The intervener, Building Service Employees International Union, Local 268 took the position that this application (and applications with each of the General Hospital of Port Arthur and McKeller General Hospital, all dealt with in the same decision) was untimely because the RNA's were covered by a collective agreement between the intervener trade union and the hospital. In two of the three workplaces the Board had previously certified the intervener to represent bargaining units of employees which included the classification of "nursing assistant" (which it was agreed became known as RNA). At the third, McKeller General Hospital, the Board issued a certificate for a bargaining unit comprised of all employees employed in sixteen named classifications (those that would fall within a "service" unit"). RNA's were not however one of the named classifications. At the time of bargaining for the first collective agreement in each of these cases no RNA's were employed by any of the hospitals. The classification of RNA was excluded from those collective agreements where the certificates had originally included them. Thereafter the hospitals did employ RNA's and the intervener trade union attempted to negotiate the classification of RNA into the collective agreement. It was not successful until the round of bargaining in question in these applications. The intervener relied on these collective agreements as constituting a bar to the applications being considered.
- 32. At the time both St. Joseph's Hospital and McKeller General Hospital recognized an informal association of RNA's. The Board concluded however that at the time of executing the collective agreements the intervener had not sought the support of any RNA's nor were the RNA's aware (whether from the intervener, the hospitals, or other source) that their inclusion in the bargaining units was being negotiated until after the collective agreements had been executed. Having learned of their inclusion the RNA's at the three hospitals created the applicant and filed the applications under consideration.
- The majority of the Board in that case concluded that the applicant was not barred from making its applications for certification. The majority treated the execution of the latest collective agreements including the RNA's as equivalent to a first time voluntary recognition by the hospital of the representation of RNA's. In that the intervener represented no RNA's the majority found that the applicant was entitled to challenge the right of the intervener to represent them. The Board then went on to deal with the applicant's request for bargaining units at each hospital comprised of only RNA's. It noted that the applicant's constitution allowed it to take into membership only full-time and part-time RNA's employed in the Lakehead area. The Board then stated at paragraph 20 of the decision:

... The Board has found, however, that registered nursing assistants by themselves do not constitute an appropriate unit of employees for collective bargaining (see *Board of Health of the York County Health Unit Case*, O.L.R.B. monthly report, November 1967, p. 716). The only appropriate unit would be a tag-end unit. That is to say, all those classifications of employees at the hospitals, including the registered nursing assistants, not already represented by a trade union.

- 34. There was no further discussion of the bargaining unit description issue. Given the applicant's restriction on membership the majority concluded there was no appropriate unit at these hospitals which the applicant could represent and dismissed the applications.
- 35. In Essex Health Association supra, the Union of Nursing Assistants applied to be certified for a bargaining unit of RNA's. The intervener, Building Service Employees International Union, Local Union 210 had been certified in 1948 to represent employees in various classifications including ward aides, orderlies, nurses' aides, but not including RNA's. The employer and intervener took the position that RNA's shared a community of interest with employees in the intervener's bargaining unit.
- 36. The comments of the Board both with respect to history and community of interest are interesting:
 - 8. ... While it is quite apparent from the evidence contained in the Examiner's reports and the evidence viewed by the Board during its inspection of the hospital that the registered nursing assistants share a community of interest with registered and graduate nurses, it is equally apparent that they also share a community of interest with other hospital employees including unregistered nursing assistants, nurses' aides, orderlies, male attendants and psychiatric attendants, among others.

. . .

- 10. In addition, in the same way as the classifications enumerated above share a community of interest, such community of interest appears to be shared by other hospital employees, e.g., physiotherapists, occupational therapists, speech therapists, x-ray technicians, lab technicians, among others. However, the parties did not direct sufficient attention to this area to permit the Board to reach a definite conclusion. This much is certain, however, while registered nursing assistants as a classification are distinguishable for the purpose of identification, they are not severable from other classifications by reason of community of interest.
- 11. As stated above, the applicant also argued that registered nursing assistants are entitled to be considered as an appropriate bargaining unit for reasons similar to those applied by the Board in determining that units of registered and graduate nurses are appropriate for collective bargaining. In support of this argument, the applicant pointed out that not only are registered nursing assistants and registered and graduate nurses covered by the Nurses' Act but their functions in the hospital are very similar as the name of their classifications implies.
- 12. Historically, registered and graduate nurses have never been included in bargaining units with other employees (except in one or two instances where they were included by agreement of the parties). The Registered Nurses' Association, while it has not been recognized as a trade union, appeared to satisfy the needs of registered and graduate nurses without the benefits of collective bargaining under the Act. The Board gave effect to the history of separation of registered and graduate nurses from other hospital employees, which distinguished the registered and graduate nurses from employees who had historically bargained collectively.
- 13. While registered and graduate nurses had bargained separately and apart from other hospital employees, through the agency of the Registered Nurses' Association, to improve their working conditions, it is only in recent times, however, that such separate bargaining has been under the authority and pursuant to the provisions of The Labour Relations Act. In addition, by reason of their special skills, which are shared by all registered and graduate nurses, they are distinguishable from other hospital employees. By analogy to the provisions of section 6(2) of the Act and their history of exclusion from hospital bargaining units, the Board, pursuant to the provisions of section 6(1) of the Act, found units of registered and graduate nurses to be appropriate for collective bargaining.
- 14. The registered nursing assistants, however, have a different history. From the evidence before us, it would appear that the classification of certified nursing assistants first received recognition during the 1940's. As the nature and quality of training developed and improved, the

classification of certified nursing assistants became known as registered nursing assistants. The registered nursing assistants were consistently included in bargaining units represented by the intervener union since 1951 when the Board commenced describing units on an "industrial" or "all employee" basis. It has been part of the Board's regular practice to include registered nursing assistants (formerly certified nursing assistants) in "all employee" hospital bargaining units since 1951.

15. The applicant argued that registered nursing assistants share a greater community of interest with nurses than with other hospital employees. This argument was dealt with by the Board in an application by Canadian Union of Public Employees for a unit which included registered nursing assistants in the *Board of Health of the York County Health Care Unit Case* O.L.R.B. Monthly Report, April 1967, p. 34, and in an application by Nurses' Association York County Health Unit for a unit of registered and graduate nurses in the *Board of Health of the York County Health Unit Case*, O.L.R.B. Monthly Report, April 1967, p. 62. In those cases, the Board stated its position at p. 63 as follows:

The applicant stated that it organized itself to represent registered and graduate nurses only, having regard to the Board's history of excluding these classifications from bargaining units. In addition, the applicant did not consider taking into membership registered nursing assistants because of the Board's history of including registered nursing assistants in bargaining units with other employees. It is to be noted that the usual hospital bargaining unit includes registered nursing assistants but excludes nurses.

If the Board were to accede to the respondent's request in this case the Board would have to find that the Canadian Union of Public Employees, which seeks to represent registered nursing assistants and had a history of representing them, is no longer entitled to do so, and, in addition, if the Board agreed with the respondent's position the Board would have to find that the applicant in the instant case would be compelled to represent registered nursing assistants even though it does not desire to do so and its constitution does not provide for their admittance to membership.

Having regard to the fact that the applicant's constitution was prepared in light of the Board's practice of including registered nursing assistants in bargaining units with other employees, and the fact that the Canadian Union of Public Employees has a long history of representing that classification, the Board is not prepared in this case to compel the applicant to take registered nursing assistants into membership. While it may be that if the Board were faced for the first time with the problem of determining the appropriate bargaining unit for registered nurses and registered nursing assistants, it might well decide that employees who are concerned with direct patient care would share a community of interest which would entitle them to be bargained for in the same bargaining unit. Moreover, it must be recognized that in addition to nurses and registered nursing assistants there are other employees concerned with direct patient care such as orderlies, nursing assistants who are not registered, and other classifications. However, the Board is not prepared to disregard its long history of including registered nursing assistants in bargaining units with other employees and apart from any other consideration, this history of bargaining has developed the community of interest which existed between the registered nursing assistants and other hospital employees. In addition, the Board is not prepared to find, on the evidence of this case, that the registered nursing assistants' functions are substantially different from the functions performed by them in a hospital, and, accordingly, the community of interest of the registered nursing assistants in this case must be determined having regard to the long history of their inclusion in "all employee" bargaining units for hospitals, and the history of representation of registered nursing assistants by the Canadian Union of Public Employees in such "all employee" bargaining units.

16. Academic attainment and the exercise of special skills are not sufficient in themselves to cause the Board to separate the persons who exercise special skills from bargaining units which include other employees. Of greater importance is the manner in which the skills are exercised. If the special skills are exercised in conjunction with persons in other classifications who exercise

related skills or as part of a team, which includes other classifications, such interdependence is of greater importance than the mere nature of the skills. There are other classifications in addition to registered nursing assistants who would be eligible for inclusion in "all employee" hospital bargaining units in accordance with the Board's present practice. A tag-end unit to the bargaining unit represented by the intervener would include all other such classifications.

. . .

- 19. We must therefore determine, pursuant to section 6(1) of the Act, whether the unit applied for by the applicant is appropriate. Since the registered nursing assistants share a community of interest with other employees in the bargaining unit represented by the intervener, a "tag-end" unit to the intervener's bargaining unit would be appropriate. However, such tag-end unit would include persons other than registered nursing assistants, and the applicant is precluded by its general by-law from taking such persons into membership, and, accordingly, is not eligible to be certified for a tag-end unit. Because of the community of interest shared by the registered nursing assistants with other hospital employees and because of the history of including registered nursing assistants in bargaining units with other hospital employees, the Board in this case is not disposed to find that registered nursing assistants constitute a unit of employees of the respondent appropriate for collective bargaining.
- 37. It is not clear why RNA's were originally excluded either at the McKeller General Hospital or at Essex Health Association. In both the bargaining units were described by naming particular classifications. We note that the result in these cases is not only to preclude participation in collective bargaining by RNA's at that particular point in time but also to preclude their participation through the auspices of the bargaining agent of their choice.
- 38. The tension in describing an appropriate bargaining unit configuration in light of the employee right in section 3 of the Act to join a trade union of one's choosing was discussed in *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459 at para. 13:

. .

Another point worth making at the outset is the inherent tension between the Board's responsibility to fashion practical bargaining structures and the equally important concept of freedom of association expressed in section 3 of *The Labour Relations Act*, R.S.O. 1970 C.232, as amended. In *Ponderosa Steak House* (1975) O.L.R.B. Rep. Jan. 7 the Board expressed this relationship well in writing:

"A primary theme set out in The Labour Relations Act, and affirmed by the Board, is the principle of freedom of association. The preamble to the Act makes it clear that it is the intention of the Legislature to encourage collective bargaining "between employers and trade unions as the freely designated representatives of employees". More specifically, section 6(1) of the Act expressly provides that the wishes of the employees as to the appropriateness of the unit are to be considered by the Board. In other words, the act recognizes that it is desirable that employees be able to organize in a form that corresponds with their own wishes. Given this legislative policy favouring the right of self-organization, the board must be careful that its determination as to the appropriateness of the bargaining unit has given proper weight to the wishes of the employees. An earlier decision of the Board, The Board of Education for the City of Toronto, July O.L.R.B. Monthly Report 30, clearly endorses such an approach. In giving due consideration to the wishes of the employees, the Board, in the absence of contrary evidence must assume that their wishes are expressed by the applicant union as the representative of the employees. This point was made by the Board in Board of Health of the York-Oshawa District Health Unit, 1969 June O.L.R.B. Monthly Report

The right of self-organization, however, must at times compete with the need for viable and harmonious collective bargaining. Section 6 of the Act specifically requires the Board to determine, not just a unit of employees, but "the unit of employees that is

appropriate for collective bargaining". In other words, the Board has a responsibility under the Act to create a rational and viable collective bargaining structure, even though the exercise of this responsibility may sometimes conflict with the right of self-organization. This responsibility was recognized by the Board in the *McMaster University* case, 1973, February O.L.R.B. Monthly Report 102, and in the *Board of Education for the City of Toronto* case, supra.

The determination of what constitutes a viable collective bargaining structure requires the Board to consider matters of industrial relations policy, such as community of interest and fragmentation of employees. Community of interest may be a requisite for viable collective bargaining, since the representation of disparate employee groups by one bargaining agent may put impossible strains upon it as it performs its role in the bargaining process. At the other extreme, a too narrow definition of community of interest may create undue fragmentation of employees, leading to a weak employee presence at the bargaining table, or the possibility of jurisdictional disputes among competing bargaining groups. It should be observed, however, that the Act does not create any presumption in favour of the most comprehensive unit of employees, even though these employees may have a community of interest. Section 1(1)(b) of the Act states that ""bargaining unit" means a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either or them".

This provision makes it quite clear that the determination of appropriateness does not always lead to the conclusion that the most comprehensive unit is also the most appropriate unit. Consideration of the wishes of employees, and of industrial relations policy, may very well dictate that a smaller bargaining unit is the appropriate unit. This point was clearly made in *Board of Education for the City of Toronto* case, supra.

But unfortunately, these themes merely describe conflicting impulses in any one case and do not provide concrete solutions. [Rational] solutions lie in the careful examination of evidence for significant differences in [community] of interest between occupational groupings bearing in mind the structural requirements for effective collective bargaining and labour relations. At the risk of being repetitive we think it important to observe that it is natural for certain groups of employees to be apprehensive about the outcome of collective bargaining if their occupation does not dominate a bargaining unit in sheer numbers and seldom is the Board confronted with applications for certification affecting employees with identical interests, abilities and backgrounds. Thus, if the Board was to be preoccupied with these apprehensions an unmanageable proliferation of potentially ineffective bargaining units would be the likely result. Accordingly, the Board must concern itself with only significant differences between employee interests and these significant differences must result in practical bargaining unit demarcations - practical in the sense that demarcations must provide efficient answers to like cases; there must be reasonable assurance that they can withstand the passage of time; and practical in the sense that sound collective bargaining relationships can be built upon them.

[emphasis added]

39. In Stratford General Hospital, supra, the Board adopted the more comprehensive paramedical bargaining unit (including technical employees) acknowledging the Board's preference for a more comprehensive unit. We note that that occurred in the context of two competing applications for certification wherein the Board also acknowledged that:

where there are competing applications the Board can be more concerned with the ideal characteristics of collective bargaining structures in that whatever the decision, employees will not be denied access to the collective bargaining process. (paragraph 19).

In that case recognition of the right of self-organization and the consequent opportunity to participate in the collective bargaining process was provided for and on balance the Board could then

fashion a more ideal bargaining structure. We are less confident that by adopting a more comprehensive bargaining unit the same balance can be struck in the case before us.

- 40. It is clear that the RNA's at this institution oppose being included in the service unit. As well there is no evidence of any appetite for collective bargaining on the part of paramedical employees or nurses and more particularly, none that seeks to include RNA's. The latter is perhaps not surprising in light of the very history of collective bargaining in the hospital sector not-withstanding the remarks in 1985 in *Hospital for Sick Children* regarding the community of interest between RNA's and these other employees in the hospital setting. Where does that leave this group of employees in their ability to assert their interest in collective bargaining?
- At an early point in history the Board recognized a separate bargaining unit for registered and graduated nurses. RNA's (or certified nursing assistants) were employed to perform at a substantially lower skill level compared to nurses and compared to the level of skill expected of RNA's today. Although "service" employees were organizing, little if any organizing of paramedical employees was occurring. Subsequently those paramedical employees have sought to participate in collective bargaining and appropriate bargaining unit configurations for those various employees have been determined (see particularly *Stratford General Hospital*, *supra*). The fact that RNA's have historically been included in the service unit appears to be at least partly as a result of the Board having recognized nurses in a separate bargaining unit (see the quote from *Essex Health Association* at paragraph 37 herein).
- 42. However, today, much in the provision of health care has and is evolving. If one were to look anew at appropriate bargaining unit configurations in the hospital sector it is readily arguable that the evolution of skills and training and the nature of the work now performed by RNA's places them with a closer community of interest to either nurses or employees in the paramedical bargaining unit rather than with employees in the service unit. As stated in *Stratford General Hospital*, (and recognized in *Hospital for Sick Children* see para. 37) there exists a functional interdependence between the activities of these various groups of employees. However while recognizing that current reality one must also function within, and take account of the historical context.
- Over time RNA's have undergone a "process of professionalization" not unlike nurses and those employed in paramedical classifications (see the discussion in *Stratford General Hospital*, supra at paras. 14 and 15 and the comments in *Hospital for Sick Children*, supra at paras. 19, 36 and 37). No doubt this process has also affected the RNA's approach to collective bargaining. However we agree with the discussion in *Stratford General Hospital* and *Hospital for Sick Children* that claims of professional status do not warrant the fashioning of separate bargaining units.
- 44. The Board has long recognized that RNA's share a community of interest with other employees in a "service" or "all-employee" bargaining unit. It has also recognized that RNA's may well share a community of interest with RN's or paramedical employees, but that by virtue of trade union organizing and collective bargaining history, the RNA's have found themselves included in the service unit. In light of that history to include RNA's in a service unit and on the evidence before us, the unit proposed by the respondent is not inappropriate. As made clear in Hospital for Sick Children, supra it is now too late to say that RNA's cannot be appropriately included in a "service" bargaining unit. However, that is not the issue before us.
- 45. It is now well established that the Act requires the Board to determine not the "most" appropriate bargaining unit but "an" appropriate bargaining unit (see as well for example K-Mart Canada Limited [1981] OLRB Rep. Sept. 1250). In Hospital for Sick Children, supra, the Board stated that the objective is a viable collective bargaining structure and then summarized the issue this way:

does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.

We note that issues of undue fragmentation can relate either to the viability of the proposed bargaining unit or to whether serious labour relations problems will be created for an employer.

- 46. Does the applicant's proposed bargaining unit create undue fragmentation and serious labour relations problems for the employer? This too must be considered in the context of the history of collective bargaining in the hospital sector and also in light of section 3. Part of that collective bargaining history now includes ongoing attempts by groups of RNA's to participate in collective bargaining outside the service unit and through a bargaining agent chosen to represent their felt needs and concerns.
- The bargaining unit sought by the applicant here clearly includes a group of employees with a sufficiently coherent community of interest that they can bargain together and do so on a viable basis. The applicant seeks to represent a group of employees totalling approximately 165 all of whom have similar skills and perform similar functions and enjoy similar terms and conditions of employment. This is a largely unorganized hospital wherein the employer already recognizes and has a history of dealing separately with this same group of employees in a less formalized manner but for purposes very similar to those in collective bargaining. While we might prefer that the RNA's, if opposed to being included in a service unit, be included in a bargaining unit with either RN's or paramedical employees, on balance, we are not persuaded, notwithstanding the Board's earlier decisions, that there is potential for serious labour relations problems in this institution, provided the bargaining unit is described as including those persons employed as registered or graduate nursing assistants. While we have some reservations about overlaps in function between RNA's and orderlies we are not persuaded that it is of a sufficient degree so as to overcome the otherwise viable nature of the bargaining unit. Three of seven orderlies are employed in the emergency department where no RNA's are employed (nor is that contemplated). The employer will still have to deal with the potential greater difficulty of overlaps in function between the RNA's and RN's. That potential currently exists throughout the health care sector. This conclusion may well be different in an institution where there exists a large complement of employees in classifications whose functions overlap. However that is not the evidence before us.
- In coming to this conclusion we do not intend that anything more be taken from it than is necessary for the resolution of the dispute between these parties. A bargaining unit comprised of one classification of employee is not one that would normally be found to be appropriate. RNA's do not enjoy status as a craft. Both these factors are relevant to the current configuration of bargaining units in the health care sector. The multiplicity of classifications contained in a paramedical bargaining unit do not evidence this same historical anomaly faced by the RNA's. Therefore, it is doubtful that any sensible basis would exist for fragmenting that "usual" bargaining unit any further, particularly in light of the Board's comments in Stratford General Hospital, supra, (and see Toronto East General and Orthopaedic Hospital Inc., [1981] OLRB Rep. Nov. 1672). While the decision in Hospital for Sick Children, supra, places considerable weight on the bargaining unit configuration sought by an applicant it does not ignore concerns of undue fragmentation. In that RNA's do not have status as a craft there would seem to be no basis from which they could "carve out" their classification from existing bargaining unit configurations (Section 6(3) also creates a discretion in the Board where employees are already represented by another trade union to determine whether a "carve-out" would be appropriate in the circumstances of any particular case. See for example, Shelbourne Residence; Re O.N.A. [1991] OLRB Rep. Aug. 1005). To the extent that this decision speaks to bargaining unit configurations in a hospital setting and more particularly those involving RNA's it recognizes that a bargaining unit comprised solely of RNA's may be an

appropriate bargaining unit while at the same time recognizing that a bargaining unit described as the "standard" service or all-employee unit including RNA's may well also be appropriate. The Board has already acknowledged that RNA's may also share a community of interest with either the RN's or the employees in the "paramedical" unit. In this case the applicant seeks to represent RNA's and while recognizing a continuing concern regarding undue fragmentation and its potential effects on both effective collective bargaining and legitimate employer concerns we are not persuaded that in this case they outweigh the equally compelling expression of these employees' section 3 rights.

Having regard to the above, we find that all employees employed as registered or graduate nursing assistants by the respondent in Mississauga constitute a unit of employees of the respondent appropriate for collective bargaining. The parties remain in dispute with respect to whether there should be separate bargaining units for full-time and part-time RNA's respectively. This matter is referred to the Registrar for the purpose of scheduling a hearing to deal with that and any other remaining issues. In order to expedite the further scheduling of this matter we note that this panel is not seized.

DECISION OF BOARD MEMBER W. A. CORRELL; December 5, 1991

The majority decision recognizes all registered or graduate nursing assistants employed as such at the Mississauga Hospital as a unit appropriate for collective bargaining.

- 1. I dissent from the majority decision because:
 - i) it goes against the many previous decisions of this Board without compelling reasons;
 - ii) it rejects the recommendations of the Johnston Commission and the consequences for collective bargaining in the Health Services sector;
 - iii) it has the potential at this hospital to lead to further bargaining unit fragmentation and problems of labour relations instability;
 - iv) it can ultimately disrupt the harmony of others sectors of the labour relations community;
 - v) the difficulty needs to addressed not on a short-term or narrow basis but on a longer term and broader study of needs and potential problems.
- 2. The reasons for my dissent follow.
- The majority decision has reviewed the relevant Board decisions bearing on this case. The most significant of these are noted as *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, and the decision quotes extensively from that decision; *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. Mar. 481; and *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459. These are noted in this dissent to underline their importance in this matter and that the majority have clearly understood the history of this Board's record. The Board has not in previous decisions supported the concept that smaller units are better, or that units defined by classification or department are neat and orderly and the majority decision has recognized these concepts. The Board over the years has clearly decided that its responsibility lies in the area of understanding and promoting long term views of the collective bargaining scene and has made decisions on this basis. In *Kidd Creek* and

Stratford General Hospital it was noted that fragmented structures for bargaining could add to labour-management problems. These decisions note that more attention at the "front end" of bargaining unit determination can aid immeasurably in the development and maintenance of long term labour relations harmony.

- 4. The Board has historically endeavoured to bring some order to the administration of labour relations in the Health Services sector with some considerable success. In the identification of bargaining units it has rejected units based on self-interest applications. It has attempted to identify units with a community of interest or by an acceptance of those units identified by the *Report of the Hospital Inquiry Commission* chaired by D. L. Johnston, November 1974 as appropriate for bargaining and interest arbitration in a central process.
- The Johnston Committee recommendations were not restricted only to this subject but a major part of the report recommends a structure of bargaining and is worthy of quoting since it has been a main stay in the decision-making of this Board. "Public Hospital Employees should be grouped into three categories for the purpose of bargaining Service; Nursing; Paramedical. Future certifications of bargaining units should recognize only these categories." This recommendation was made in response to the terms of reference established by the Minister of Labour for this Province. One of these directives was to examine:

"...the feasibility of collective bargaining in respect of hospital employees being conducted on other than an individual hospital basis."

6. The report goes on to expand in Chapter IV on the recommended structure for bargaining. Obviously a great deal of time and study was devoted to this subject with input from many unions, hospitals and employer organizations. The report has many interesting and challenging concepts. The relationships described are not irrelevant to the scene today. Many of the identified proposals have been utilized and are still developing. Some of the concepts need *further* updating perhaps and could form the basis for an in-depth study and accelerate a more energetic development. It does note also that its recommendation on the three categories for bargaining is designed "to limit the amount of fragmentation that might accompany an increase in organizing activity in the paramedical field". In discussing the alternatives for structuring bargaining units within these groups no mention is made of RNA's as such except to place them without further comment into the service group. It would appear that at the time of the study RNA's had not perhaps developed their role in patient care to the current level. The report does conclude this part of its investigation with the further statement on page 42 as follows:

"Finally we believe that a proliferation of unions is not advisable in the hospital field and organizing and negotiation resources which are scarce enough at present should not be spread over multi-jurisdictional boundaries."

- This has, in fact, become the reality. A recent arbitration award by R.D. Joyce *Huntsville Hospital* is instructive in this area of negotiations and it makes detailed and far-ranging recommendations for the refining and expanding of this process. Decisions to adopt bargaining relationships which depart from the historical norm should not be taken lightly. A longer range view is required for we are dealing with the longer term impact on future collective bargaining in this sector. The Board's policy to organize in a community of interest direction based on the Johnston Commission's recommendations has been successful although not perfect. The exceptions however should not dictate that the achievements to date should now be thrown out with the bath water.
- 8. The majority decision after reviewing the consistency and importance of the past decisions of the Board decides to turn in another direction. This turn hinges it would seem on a state-

ment in paragraph 40 of the majority decision. The RNA's might be denied the opportunity of having a bargaining agent of their choice. Paragraph 40 asks, "Where does that leave this group in their ability to assert their interest in collective bargaining?". The RNA's, the majority fears, would be left out of the process of selecting a union to represent them.

- 9. The right to be included in the process was rejected by the RNA's when the union (the United Steelworkers of America) that chose to organize the unit was rejected as not wholly acceptable to them. The question then is not that they do not have a place in the process, "to assert their interest in collective bargaining", but becomes instead the right they have to a particular choice of a union. The right of a "particular" choice however would conflict with the Board's policy and the clear precedent of prior decisions over many years.
- 10. Can the Board now decide to ignore the past and accept a tinkering with precedent or decide instead that the credibility of the Board and the practicality of the current collective bargaining arrangement should be put at risk.
- 11. The decision does not accept as a real problem the risks of fragmentation of bargaining units. These risks are detailed in *Bestview Holdings Limited*, [1983] OLRB Rep. Aug. 1250. That award warns at paragraph 28 that favouring small units in the search to satisfy self-determination and community of interest arguments leads to more serious dangers in the overall harmony of labour relations. Fragmentation it states must be avoided if a viable structure for collective bargaining is going to exist and survive.
- 12. The majority decision quotes extensively from *Bestview Holdings Limited*, paragraph 28 at the majority's paragraph 18 on the subject of bargaining unit proliferation. They are important enough to summarize again. A proliferation of small units:
 - results in unnecessary work stoppages (either through picket line activity or the back-up of flow-through work);
 - increases the number of rounds of bargaining;
 - encourages political competition between different unions jockeying for "a better deal";
 - denies employees the opportunity to seek the lower benefit insurance costs available to larger units;
 - complicates the development of fair wage structures throughout a total enterprise.
- 13. Fragmentation and proliferation of bargaining units also has a negative impact for unions. A smaller unit means reduced income from dues to finance the important functions of bargaining and rights arbitration. Fewer members will be available to fill the leadership needs and the potential that resource provides for growth and influence, internally and externally. Small units will be less able to provide pressure for reform of legislation and other political agendas external to the bargaining unit. The need to join other units in any council formed to overcome these shortcomings, wastes the energies of the union in internal conflict and a watering down of membership ambitions.
- 14. A further factor to be considered by unions and indeed the entire labour relations community is that of carve-out. While some remain confident that the Board can control such adven-

turesome forays, increased pressures may arise as a result of this decision and other decisions that may follow. In the instant case RNA's currently organized with other classifications will more than likely seek to be recognized "in the union of their choice" and may indeed be encouraged to do so by the RNA's own association. If they are frustrated in their attempts, members are likely to feel cheated and argue discrimination. The RNA's association in such circumstances will have to deal with their members on this subject as a professional group and, dealing with the inevitable membership and political pressures, consider the benefits of pressing for further tinkerings with the Board's past decisions.

- 15. Conceivably other groups in the industrial community who also perceive the need for a special bargaining unit could come forward seeking some form of carve out or other special privilege. The Board will then have the same policy decision to make; rely on past-practice and precedent (an argument weakened by this decision) or seek a more organized review of the problem on a longer term basis. The Board if undecided may have to follow the third alternative and continue with piece-meal, narrow-view decisions as the current pulls it along. The majority decision states at paragraph 48 that the circumstances of each case must be balanced against these other concerns. I am not persuaded, however, that in this case the evidence is so compelling as to overturn the years of Board past practice.
- 16. There are changes occurring in the Health Services field not the least of which is the gradual and steady change in the job responsibility of the RNA. I agree with the statement in the majority decision made at paragraph 42:

"However, today, much in the provision of health care has and is evolving. If one were to look anew at appropriate bargaining unit configurations in the hospital sector it is readily arguable that the evolution of skills and training and the nature of the work now performed by RNA's places them with a closer community of interest to either nurses or employees in the paramedical bargaining unit rather than with employees in the service unit....However while recognizing that current reality one must also function within, and take account of the historical context".

- I do not agree however with subsequent findings by the majority that through this decision there is no potential for serious labour relations problems at this institution. There is every potential for this within every department or sub-group not now organized in paramedical and service units. The very serious problem of separate bargaining with each of such units is more than evident here. At least two other unions have a serious interest in organizing at this institution. The will and wishes of those about to be approached may well be influenced by the precedent and example of this decision, that is to organize on a self-interest basis. As noted before, the Johnston Commission recommendations were very aware of these potential problems when they examined the structure of Health Service bargaining. Its recommendation to limit the number of bargaining units has successfully contained the inefficiencies of such a result. It is also easily discernible however that outside of this hospital this organization attempt is but one of many steps to be taken by RNA's and their Association to organize RNA's as separate units for bargaining throughout the Health Service sector.
- 18. I do not agree that fragmentation will not be a problem. Any success in this certification attempt could well be reflected elsewhere in this institution. Any weakening of individual union strength through organizing small units will create labour relations instability. Unions lacking funds, strong leadership and battling internal political currents within a larger entity will not improve or control the kind of harmonious relations this *Act* is supposed to develop and maintain.
- 19. This is not a small step to be taken. Board decisions should not contradict previous decisions and long term precedents without compelling reasons. This application should be rejected for reasons of maintaining prior Board decisions and supporting the current collective bargaining

approach. A rejection of this application would reinforce the confidence of the community in the Board's long term dedication to stability in the field.

- 20. Let other government initiatives recognize that there are changes occurring in the Health Services sector and what remedies are required. Such a study would, with input from all interested parties determine how far those changes have gone and what major change is needed in collective bargaining structures and the recognition of different certification applications in the sector. That approach would recognize the importance of long term direction and balance between various interests. It would also underline the Board's determination to maintain stability and harmony in the Health Service sector's labour relations community.
- 21. I would reject this application for the above reasons.

0290-91-JD International Union of Elevator Constructors, Local 50, Applicant v. **Otis Elevator Company Limited** and Schindler Elevator Company Limited and Foundation Company of Canada and Plan Electric Company and International Brotherhood of Electrical Workers, Local 353, Respondents

Construction Industry - Jurisdictional Dispute - Practice and Procedure - Complainant failing to offer any explanation or to suggest any reason why its request for leave to withdraw its complaint should be granted - Request for leave to withdraw dismissed by Board - Jurisdictional dispute complaint dismissed

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members R. W. Pirrie and C. A. Ballentine.

DECISION OF THE BOARD; December 9, 1991

- 1. In response to its November 5, 1991 decision herein, the Board has received responses from only the respondent Foundation Company of Canada ("Foundation") and the respondent International Brotherhood of Electrical Workers, Local 353 (the "IBEW"). No party has requested a hearing and the Board is satisfied that it is appropriate to dispose of this matter on the basis of the materials and submissions already before it.
- 2. This is a jurisdictional dispute complaint brought before the Board under section 91 of the *Labour Relations Act*. The complaint bears an application date of April 25, 1991. In the brief it filed, the complainant described the work in dispute as being:

... the pulling and hook up of wiring from the elevator, escalator and moving walks controller to the terminals on the common lobby panel, which in this case is a computer. This work includes the laying of piping through which the wiring is pulled and the hook up of the wires at the elevator, escalator and walkway controller and the hook up of the wires to the terminals on the computer.

The respondents Plan Electric Company ("Plan"), IBEW, and Foundation have described the work in dispute as including:

... all the work connected with the design, supply and installation of computerized monitoring and control systems which work normally can be segregated into five phases:

- The supply and installation of the computer hardware as well as the design and installation of the computer software;
- b) The laying of conduit between the equipment to be monitored and controlled and the computer control room;
- c) The pulling of wires and cables through the conduit;
- d) The hook up of the wires and cables to the computer in the computer control room; and
- e) The hook up of the wires and cables to the equipment to be monitored and controlled.

To the extent that there is a difference or distinction between the two descriptions it seems more probable than not that the one suggested by Plan, Foundation and the IBEW is most accurate since the work was performed by members of the IBEW employed by Plan. In any event, the complainant has complained that the work in question ought to have been assigned to its members.

- 3. The complaint was processed in accordance with the Board's usual practice. This practice requires all parties to prepare and file comprehensive briefs and documents in accordance with Board Practice Note #15. Also in accordance with the Board's practice, a Pre-Hearing Conference was scheduled for May 13, 1991. That was adjourned on agreement of the parties and was rescheduled for June 24, 1991. That date was also adjourned and the pre-hearing was rescheduled for August 12, 1991, a date selected in consultation with the parties and to which they all agreed.
- 4. The Pre-Hearing Memorandum prepared by the panel which pre-heard the matter indicates that prior to the pre-hearing conference the parties met to discuss the matter, and that when they appeared before the pre-hearing panel the complainant sought leave to withdraw the complaint. When that request was opposed by the IBEW, Plan and Foundation, who submitted that the complaint should be dismissed, the complainant took the position that the pre-hearing panel was without jurisdiction to dispose of that issue.
- 5. On the complainant's own brief, it appears that it learned in late October, 1990 that the work in dispute had been assigned to members of IBEW employed by Plan and that soon afterwards it delivered a grievance to Otis Elevator Company Limited ("Otis") complaining of that work assignment, even though the assignment had in fact been made by Plan (a company with which the complainant has no applicable collective agreement). That grievance was referred to the Board in early November, 1990 and then adjourned *sine die* so that the jurisdictional dispute complaint could be "initiated".
- 6. This complaint was not filed until April 25, 1991 almost six months later. Although it was Plan which made the actual work assignment (for purposes of section 91 of the Act), the complainant seeks no order against Plan. Indeed, the only respondent against which the complainant seeks a specific remedy is Otis.
- 7. In its brief, the complainant also pleads that the work in dispute was originally assigned by Otis to its members. It then pleads that Foundation sub-contracted its work to Plan which "reassigned" it to members of the IBEW. Although the complainant does (briefly) describe the change in the plans for the work, it offers no explanation regarding how Foundation came to be involved. Nor does it offer any explanation for its assertion that Plan "reassigned" the work, since it is not apparent on the face of any of the materials before the Board that Plan ever made any assignment of the work in dispute to other than members of the IBEW.

- 8. In the result, we are left with a jurisdictional dispute complaint filed some six months after another proceeding was adjourned to permit it to be filed, in which on the materials before the Board, the complainant has never made a demand for the work in dispute, and in which the only specific remedy is against an employer which had, at best, only a remote connection with the work in dispute and which did not, in any event, make the assignment complained of.
- 9. On the other hand, we have the complainant's bald request for leave to withdraw its complaint.
- Jurisdictional disputes are lengthy, labour intensive and expensive proceedings which are not to be initiated lightly. We can appreciate that a complainant may have good reason to initiate a complaint and subsequently seek to withdraw it. Where the Board is satisfied with the explanation or reasons offered in that respect, leave to withdraw will generally be granted, with or without conditions (see section 91(12) of the Act).
- 11. In this case, the complainant has failed to offer any explanation or suggest any reason why its request should be granted. Perhaps it has no explanation or reason. In any case, we are unable to discern any reason to grant the complainant's request. Further, the complaint appears, on the basis of the material before the Board, to be ill-conceived and without *prima facie* merit.
- 12. The complainant's request for leave to withdraw its complaint is therefore denied and the complaint is dismissed.

2304-91-R Service Employees Union, Local 183, Applicant v. Sisters of St. Joseph of the Diocese of Peterborough, Respondent

Certification - Whether employees excluded from the *Act* by virtue of s. 2(a) of the *Act* - Congregation's "Mother House" employing over 40 full-time and part-time maintenance, dietary, infirmary and housekeeping staff - Board concluding that employees not "domestic[s] employed in a private home" within the meaning of the *Act* - Certificate issuing

BEFORE: S. Liang, Vice-Chair, and Board Members W. N. Fraser and H. Kobryn.

APPEARANCES: Norman Dunlop for the applicant; and D. K. Gray, G. I. Campbell, Sister Jean Smith and Sister Hilda Maloney for the respondent.

DECISION OF THE BOARD; December 4, 1991

- 1. The name of the respondent is amended to read: "Sisters of St. Joseph of the Diocese of Peterborough".
- 2. This is an application for certification. Prior to the hearing the parties met with a Labour Relations Officer of the Board and reached agreement on all matters relating to this application, save one.
- 3. The outstanding issue relates to the position taken by the respondent that the employees encompassed by this application for certification are excluded from the provisions of the

Labour Relations Act ("the Act"). The respondent submits that these employees are excluded from the Act by virtue of section 2(a), which reads as follows:

- 2. This Act does not apply
 - (a) to a domestic employed in a private home;

. . . .

4. The bargaining unit for which this application is made and which the respondent, subject to its objection under section 2(a) agrees is appropriate, is the following:

all lay employees regularly employed for not more than twenty-four hours per week and students employed during the school vacation period of Sisters of St. Joseph of the Diocese of Peterborough at 1545 Monaghan Road, Peterborough save and except supervisors, persons above the rank of supervisor, office and clerical staff, registered and graduate nurses.

- 5. By way of background, in 1988 this applicant was certified as bargaining agent for all lay employees of Sisters of St. Joseph of the Diocese of Peterborough at 1545 Monaghan Road, Peterborough save and except supervisors, persons above the rank of supervisor, office and clerical staff, registered and graduate nurses, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period ("the full-time unit"). Since that certificate was issued, the parties have negotiated two successive collective agreements with respect to this unit. The most recent agreement expired on May 31, 1991 and we were advised during the hearing that the parties are presently negotiating for a new collective agreement.
- 6. The applicant and respondent are currently parties to a dispute which has been placed before the Minister of Labour in which the applicant seeks to have the provisions of the *Hospital Labour Disputes Arbitration Act* apply to the full-time unit. The respondent has taken the position in that dispute, most recently in correspondence to the Ministry of Labour dated October 18, 1991, that the employees working for the respondent are domestics employed in a private home and therefore not subject to the *Labour Relations Act*.
- 7. At the hearing before this panel, the applicant did not object to our hearing the issue raised by the respondent on its merits and we accordingly proceeded to hear evidence and argument on the issue.
- 8. Sister Jean Smith gave evidence for the respondent. Sister Smith described the origins of the Sisters of St. Joseph. This religious order was founded in France and moved into Ontario in the late 19th century. At present, there are six independent congregations in Ontario, based in Toronto, Peterborough, London, Hamilton, Pembroke and Sault Ste. Marie. The congregation based in Peterborough currently has about 150 sisters. Among other things, the congregation operates two hospitals and a home for the aged in the area. Each of the congregations has a building known as the "Mother House". In Peterborough, the Mother House is also called Mount St. Joseph and is located at 1545 Monaghan Road. At present 67 sisters from the Peterborough congregation live at Mount St. Joseph (or "the Mount").
- 9. Sister Smith described the process for entering the congregation. She related that it may involve approximately nine years from the time a woman becomes interested in joining the congregation, to the taking of final vows. Upon final vows, the sisters regard the congregation as their "first family". From that time forward, any salary or remuneration which a sister receives belongs to the congregation and in return, the congregation looks after the sisters until death.
- 10. Sister Smith stated that upon the taking of final vows, the sisters regard Mount St.

Joseph as their "home". Apart from Mount St. Joseph, sisters belonging to the Peterborough congregation may live in other congregation houses, in their own dwellings, and with or without other members of the congregation. There are sisters who belong to the Peterborough congregation who live and work outside of Ontario and even outside of Canada.

- In addition to housing 67 sisters of the congregation, Mount St. Joseph also serves as the home base for the sisters' activities throughout Canada and abroad. The sisters meet every four years at Mount St. Joseph to discuss the work of the congregation. Sister Smith is a member of the general council, which plays a leadership role in carrying out the mandate of the congregation. As well, Sister Smith is the co-ordinator of Mount St. Joseph. In this capacity, she co-ordinates the relations between the sisters, the staff and the lay supervisors with respect to the running of the house.
- 12. Evidence was led regarding the physical layout of Mount St. Joseph. Without reciting all the details offered in evidence, the ground floor facilities include a kitchen, laundry, academic wing, dining room and indoor swimming pool. Also located on the ground floor are two large activity rooms which are rented out to senior citizens. There is also an auditorium which the sisters use for their own purposes and rent out to the public for meetings. The second floor of Mount St. Joseph includes a chapel, guest rooms, the office of the general council, some bedrooms, the main entrance and a switchboard room. The third floor includes a vocation centre, consisting of several rooms which can be rented to individuals or groups for retreats. Also on this floor is the infirmary in which twenty-three sisters live. The fourth floor of the building consists of two main sitting rooms, a television room, a small kitchen area and about thirty-five bedrooms.
- 13. While many of the sisters living at Mount St. Joseph are infirm or not actively working, others work outside of the Mount, in teaching, tutoring or pastoral care.
- There are approximately twenty-five full-time employees at the Mount and sixteen part-time. The full-time staff consists of persons employed in maintenance, dietary, infirmary and house-keeping. The part-time staff consists of people employed in dietary and infirmary. The part-time staff generally have the same duties as the full-time staff. The staff in the infirmary are super-vised by a registered nurse and include registered nursing assistants, and health care aides. The staff in the infirmary work on shifts. The shifts are 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 a.m. The infirmary staff take care of the sisters confined there, bathing them, helping with their general care, feeding them and distributing medication.
- 15. The dietary staff at the Mount prepare and clean-up after meals. At each meal, one employee prepares trays carrying meals for the sisters who live in the infirmary. There is one main cook, who is full-time. Part-time staff replace full-time staff on weekends or days off. Lay staff who work at the Mount are offered meals during their shifts, with the residents.
- 16. Sister Smith also gave evidence as to the funding of the Mount. She testified that Mount St. Joseph receives no government funding, and is supported by the incomes and pensions of the sisters.

ARGUMENT OF THE PARTIES

17. Counsel for the respondent pointed out for the Board that the term "private home" as contained in the office consolidation, contains a misprint in that it has a hyphen between the words "private" and "home". In fact, in the statute, there is no hyphen. No reliance was placed upon this, and the Board does not find it of significance. Counsel for the respondent submitted that the interpretation of section 2(a) of the Act requires the Board to interpret three separate terms: "do-

mestic", "private" and "home". He dealt in turn with each of those, referring the Board to dictionary definitions, the *Employment Standards Act* and its Regulations, and common law cases discussing these and related terms. We were referred to the following cases: *Re: Estlin; Prichard v. Thomas* (1923), 2 Ch. 407; *Cameron v. Royal London Opthmalmic Hospital*, [1941] 1 K.B. 350; *Protestant Old Ladies' Home v. Provincial Treasurer of Prince Edward Island*, [1941] 2 D.L.R. 534; *Wawanesa Mutual Insurance Co. v. Bell And Bell* (1957), 8 D.L.R.(2d) 577; *In re Unemployment Insurance Act*, 1920; *In re Application By Junior Carlton Club*, [1922] 1 K.B. 166; *Wardley v. Bringloe*, [1914] 1 Ch. 682.; *Jackson v. Hamilton*, [1923] 2 Ch. 365; *Endersby v. Robert Simpson Company Limited*, [1950] O. R. 645.

- Counsel urged us, relying on the above sources, to find that "domestic" refers to a person who is employed in a private residence, and whose duties are devoted to the affairs of the household. Counsel argued that the Sisters of Mount St. Joseph constitute a household collectively. The Mount is their home, and since it serves no other purpose (except for some extraneous purposes such as lease of space to senior citizens and others), the Mount is a "private" home. He submitted that the home has no commercial characteristics, is composed of persons whose income is given to the collective household, and is maintained without any government funding.
- 19. The Board was also referred to Wellington Mushroom Farm, [1980] OLRB Rep. May 813, in which the Board found that employees of a mushroom factory were "employed in agriculture" and therefore excluded from the provisions of the Labour Relations Act by section 2(b) of the Act. Counsel urged this panel to adopt the approach of the Board in that case, in looking to the ordinary meaning of the statutory exclusion without regard for legislative purpose.
- 20. In sum, the argument of counsel was that the employees in question are "domestics", since they are employed to provide services to a household. The residence is "private"- it does not receive any funding, has no commercial aspect, and is exclusive (except for certain minor activities). It is a "home" in that the sisters regard it as their home and regard each other as their family.
- 21. The representative for the union submitted that the fact situation before the Board was no different from that of employees working in various retirement homes throughout the province, whose rights to organize under the *Labour Relations Act* has never been questioned. In his submission, the fact that this home is based on a religious order does not distinguish it from other retirement homes where individuals pay their pension incomes or a portion thereof to a home which provides for lay employees to care for them. The infirmary at Mount St. Joseph is similar to those sections of some retirement homes where additional care is provided for residents who are infirm; in both cases, if greater care is needed the residents are taken to a hospital. He also referred us to *Nucleus Housing Inc.*, [1984] OLRB Rep. Jan. 64 in which the Board considered the application of section 2(a) of the Act to employees of a non-profit corporation which provided attendants to disabled residents of an apartment building. In that case, the Board considered an argument that these employees were excluded by the provisions of section 2(a) of the Act and concluded that as the employees in question were employed by the corporation instead of by each tenant, they were not domestics employed in private homes within the meaning of section 2(a).

DECISION OF THE BOARD

Apart from *Nucleus Housing Inc.*, *supra*, there has been no case in which the Board has been asked to interpret section 2(a) of the Act. Although relevant, the Board does not find the dictionary definitions provided for the terms "home", "private", and "household" to be terribly persuasive in defining the provision as a whole. Dictionaries often give several alternative meanings for a given word, and we do not find it helpful to define a word used in a statute without regard for the full context within which it is used. As cited in Elmer Dreidger, *Construction of Statutes* (2nd

edition), 1983, "words, and particularly general words, cannot be read in isolation; their colour and their content are derived from their context" (p. 4). Driedger states the modern principle of statutory interpretation as follows: "today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (p. 87).

- 23. The phrase "domestic employed in a private home", like many phrases, is capable of more than one meaning. At its most exclusive, the concept of "private home" could also mean a single family dwelling inhabited by persons related in blood or other traditional familial bond. We agree with counsel for the respondent that an analysis of the individual terms in section 2(a) of the Act, having reference to dictionary definitions and to the manner in which these terms have been used in common law cases, and without regard for their statutory context, might lead to an interpretation of section 2(a) which covers the employees in this case. However, such an approach in our view is highly abstract.
- 24. The facts of this case involve a group of persons who are related by beliefs but unrelated by blood. Sixty-seven members of this religious order reside together in a common residence that they consider their home. In addition to housing the residents, the Mount also contains some facilities which are rented to outside groups, and is the site of the offices of the congregation. Some forty-one employees are involved in the running of the Mount, and in caring for the residents. Employees work set shifts and have established duties. Certain routines of the Mount, such as meal times, are set institutionally. The degree of control that each resident has over the running of the Mount is attenuated, as is the degree of control that each of the residents has over the employees working there. The relationship between the residents and the operations of the Mount and between the residents and their employees, is mediated through co-ordinating bodies consisting of lay supervisors and designated sisters.
- In our view, the term "domestic employed in a private home" in its ordinary and natu-25. ral meaning defined in light of the context of this Act, does not extend to the employees working at the Mount. Although we do not need to, and do not intend to provide an exhaustive definition of section 2(a), we prefer to give these words a meaning which does not exclude the employees of Mount St. Joseph from the provisions of the Labour Relations Act. We find it more consistent with the overall context of the Act, having regard to its stated purposes, to read section 2(a) in a narrower sense than that urged upon us by counsel for the respondent. Where there are words in the statute which are capable of more than one meaning, we feel bound to adopt the interpretation which is most consistent with the preamble of the Act which states that it is in the public interest of the province to, among other things, encourage the "practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees". We were not directed to any policy which favours the interpretation urged upon us by the respondent and we find it more consistent with the stated policy of the Act to exclude from section 2(a) those households which bear "institutional" elements and therefore resemble other workplaces where employees engage in collective bargaining under the Act. This interpretation also recognizes the reality that there is little in the way of an "employment relationship" between each individual resident at the Mount and its employees, and is thus consistent with Nucleus Housing Inc., supra.
- 26. We observe that nothing in the cases submitted by the respondent causes us to doubt our finding. None of them deal with an interpretation of the phrase in section 2(a) Rather, they interpret terms such as "domestic servant", "home" and "household" within contexts as diverse as succession law, insurance contracts and negligence law and are thus of limited assistance. More-

over, in several of the cases, where "domestic servant" is interpreted, the courts adopted the framework of personal service within a single family household.

- 27. We find, therefore, that the employees of Mount St. Joseph are not covered by the term "domestic employed in a private home" and are therefore not excluded from the provisions of the *Labour Relations Act*.
- 28. The Board has found the applicant a trade union within the meaning of section 1(1)(p) of the Labour Relations Act.
- 29. Having regard to the agreement of the parties, and our findings above, the Board finds that:

all lay employees regularly employed for not more than twenty-four hours per week and students employed during the school vacation period of Sisters of St. Joseph of the Diocese of Peterborough at 1545 Monaghan Road, Peterborough save and except supervisors, persons above the rank of supervisor, office and clerical staff, registered and graduate nurses,

constitute a unit of employees of the respondent appropriate for collective bargaining.

- 30. The Board is satisfied on the basis of all of the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 24, 1991, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
- 31. A certificate will issue to the applicant.

0872-91-R; 0914-91-U London and District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C., Applicant v. **Strathroy Nursing Home Ltd.**, Respondent v. Group of Employees, Objectors; London and District Service Workers' Union, Local 220, Complainant v. Strathroy Nursing Home Ltd., Respondent

Adjournment - Evidence - Practice and Procedure - Witness - Counsel objecting to question asked of witness in cross-examination - Board ruling that question may be put to witness - Counsel seeking adjournment to apply for judicial review of procedural ruling - Only $\frac{1}{2}$ hour left before scheduled time to adjourn for the day and cross-examination to be continued to next hearing date in any event - Counsel directed to move to another area of cross-examination for the balance of the day - Unless there is court direction to the contrary, hearing to resume in three months at which time question may be put to witness again

BEFORE: Nimal V. Dissanayake, Vice-Chair, and Board Members R. M. Sloan and H. Peacock.

APPEARANCES: L. Steinberg, K. Bradley and L. Timmers for the applicant/complainant; Andrew

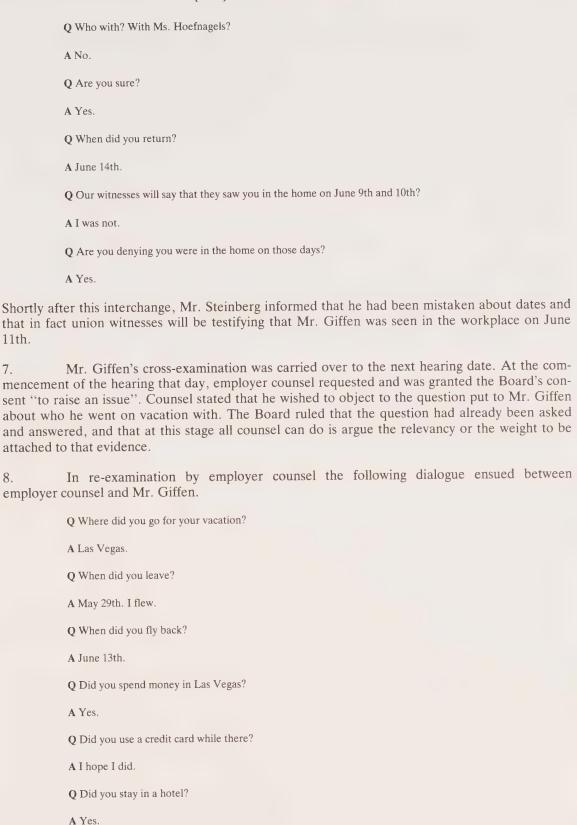
Camman, Barry Giffen, Antin Jaremchuk and Carol Hoefnagels for the respondent; Georgina Fleming, Brian T. Daly and Leann Taylor for the objectors.

DECISION OF THE BOARD; December 19, 1991

- 1. These are consolidated proceedings relating to an application for certification and an unfair labour practice complaint filed under section 89 of the *Labour Relations Act*. The applicant has relied on section 8 of the Act in requesting that it be certified without a representation vote. In addition a statement of desire objecting to the application was filed by a group of employees.
- 2. The Board commenced the proceedings with an inquiry into the voluntariness of the statement of desire. However, following the first day of hearing a principal witness was hospitalized. Thus, on the agreement of the parties, the Board suspended that aspect of the hearing and proceeded to hear evidence on the application for certification, the unfair labour practice complaint and the section 8 application.
- 3. This decision is written at the request of employer counsel, confirming an oral ruling that was made at the hearing on December 13, 1991. In order to appreciate the nature of the dispute that arose and the Board's ruling, it is necessary to briefly set out the context.
- 4. At the commencement of the hearing an exclusion of witnesses was requested, and ordered by the Board. One of the allegations made is that Ms. Lisa Timmers was dismissed from her position in the employer's Housekeeping Department contrary to the Act. The principal players involved in this allegation are Mr. Barry Giffen, the owner of the respondent nursing home, and Ms. Carol Hoefnagels, at the relevant time Supervisor of the Housekeeping Department. The decision to terminate Ms. Timmers was made by Mr. Giffen, but in so doing he relied on information provided by Ms. Hoefnagels.
- Mr. Giffen testified first for the employer. In his examination-in-chief, Mr. Giffen testified that on Sunday May 12, 1991, he looked for Ms. Timmers in the home between 1:00 - 2:00 p.m., but could not find her. Since her time card indicated that she worked till 2:00 p.m., he became suspicious, and through a memorandum (Exhibit #15) he made inquiries from Ms. Timmers' supervisor, Ms. Hoefnagels. She responded on May 25, 1991 indicating that Mr. Timmers had not requested to leave early or to change her scheduled hours of work on the day in question. Mr. Giffen testified that on May 27, he went through Ms. Timmers' time cards and picked up five which indicated hours which did not match Ms. Timmers' scheduled hours. He testified that he sent a memorandum (Exhibit #13) requesting Mr. Hoefnagels to clarify Ms. Timmers' work hours on those dates, and that he left on vacation "a couple of days" later. It was his testimony that his next involvement was after he returned from his vacation on June 14th, when he read Ms. Hoefnagels' response. Ms. Hoefnagels informed him that no prior approval had been granted to Ms. Timmers to change the scheduled hours of work on the days in question. She also informed Mr. Giffen that from September 5, 1990 to date Ms. Timmers "has 6 cancelled/sick incidents". She went on to state "This is not an acceptable job performance standard. I strongly suggest she be reprimanded accordingly." Mr. Giffen testified that he decided to dismiss Ms. Timmers after reading Ms. Hoefnagels' response.
- 6. During Mr. Giffen's cross-examination by union counsel, the following dialogue ensued:

Q When did you leave on holidays?

A End of May.



11th.

Q How did you pay the hotel?
A In cash.
Q Do you have any record of your flight or you hotel stay?
A I will check. I am sure I will have something.
Q Who was your travel agent?
A I don't recall.
Q Can you get some records from them?
A Anything is possible.

9. The next witness for the employer was Ms. Hoefnagels, who had been excluded from the hearing during Mr. Giffen's testimony. During the examination-in-chief of Ms. Hoefnagels, she testified that between May 12th, (when Mr. Giffen wrote Exhibit #15), and May 25th (when she responded to it) she had not discussed the issues raised in the memorandum with Mr. Giffen. The following dialogue ensued later during the examination-in-chief:

Q In the days following did you hear of any repercussions as a result of your response?

A No.

Q Why not?

A I was on vacation.

Q Where did you go?

A Alaska.

Q When did you leave?

A June 1st.

O Return?

A June 15th.

10. Then Ms. Hoefnagels testified that she first found out that Ms. Timmers had been dismissed when Ms. Timmers spoke to her on Sunday 16th of June as she came out of church after service, and that at the time she was very surprised to hear that Ms. Timmers had been dismissed.

During Ms. Hoefnagels' cross-examination by union counsel the following question was asked - "Who did you go with on your vacation?" Before Ms. Hoefnagels could answer, Mr. Camman for the employer objected to the question and expressed his concerns about the invasion of the witness' privacy. Mr. Daly, counsel for the objecting employees expressed similar concerns. Following some interchange, and at the suggestion of the Board, Mr. Steinberg rephrased his question to "Did you go on your vacation with Mr. Giffen?" Mr. Camman continued to object to the question and was supported by Mr. Daly. When the Board asked Mr. Steinberg, he informed the Board that he had no idea what the witness' answer was going to be, and that he did not intend to call any independent evidence as to who went with Ms. Hoefnagels on her vacation. He submitted that during examination-in-chief questions were asked about Ms. Hoefnagels' vacation and that the question put to the witness was proper cross-examination because it was very relevant to the question

tion of credibility. He submitted that the union was not attempting to pursue any issue of immorality, but trying to ascertain where, with whom and for how long, Mr. Giffen and Ms. Hoefnagels had gone on vacation.

- 12. Mr. Camman submitted that the question should not be allowed although he had established at the commencement of Ms. Hoefnagels' examination-in-chief that she was testifying under subpoena, he stated that Ms. Hoefnagels was very reluctant about testifying and that she agreed to testify only after he had assured her that she will not be required to answer any personal questions. He contended that the "law was clear" that before a personal question like the one here can be allowed, the questioner must establish "a foundation" for the question by undertaking to call independent evidence on the issue. Mr. Steinberg on the contrary had admitted that he had no evidence to call on the matter. According to Mr. Camman, Mr. Steinberg was on "a fishing expedition", and he submitted that even if the question may have relevance "indirectly or tangentially" to issues of credibility, "credibility by itself does not entitle counsel to ask personal questions".
- Mr. Daly also made submissions against allowing the question. He contended that since Mr. Giffen was the owner and the principal player against whom the union's allegations have been leveled, and particularly because the union has indicated that it has evidence to show that Mr. Giffen was in the workplace at a time when he claims to have been on vacation, the question may have been a proper one for Mr. Giffen. However, he submitted that "no charges have been made against Ms. Hoefnagels" and that there was no claim that Ms. Hoefnagels was there in the workplace during the period of her claimed vacation in Alaska. Thus Mr. Daly submitted that the question was not a proper one to be put to her.
- While counsel gave us their perception of what the "established" and "clear" law was, 14. no authority was cited by any of them. This is understandable since none of them could reasonably have anticipated this particular issue arising during the hearing. The Board, following a brief recess, orally ruled that in its view the question, "Did you go on your vacation with Mr. Giffen?" by itself did not raise an issue of immorality, and that in balancing the union counsel's right to cross-examine a witness to test the credibility of her evidence, the question should be allowed and so ruled. Mr. Giffen and Ms. Hoefnagels have testified that they went their own ways on vacation and had no discussions about Ms. Timmers during that period. It was apparent that the union does not believe that. It was the Board's ruling that the union was entitled to test the credibility of the evidence by asking the question that was put to Mr. Hoefnagels. However, the Board went on to rule that Mr. Steinberg would have to live with the answer of the witness and that he will not be entitled to pursue the issue any further as to who, if anyone, Ms. Hoefnagels accompanied on vacation. In our view this ruling draws a proper balance between the employer's concern about its witness' right to privacy and the union's right to test the credibility of evidence through cross-examination.
- Mr. Camman indicated that he wished to apply for judicial review of the Board's ruling and requested that the hearing be adjourned to permit him to do so. Mr. Steinberg strenuously opposed any adjournment. The Board ruled, with Board Member Peacock dissenting, that while the Board had no obligation to adjourn the proceedings merely because a party wishes to judicially review a procedural ruling, given that there was just over 1/2 hour left before the scheduled time to adjourn for the day, and since the cross-examination of Ms. Hoefnagels will be carried over to the next hearing date, union counsel should move to another area of cross-examination for the balance of the day.
- 16. Mr. Camman undertook to make the application for judicial review and have the application perfected. Unless there is a direction from the court to the contrary, the Board will resume

the hearing on March 6, 1992 as scheduled, at which time union counsel will be permitted, if he so wishes, to put the question, referred to in pargraph 14 above, to the witness again.

0980-91-G; 0981-91-U; 0982-91-R; 0983-91-R United Brotherhood of Carpenters and Joiners of America Local Union 785, Applicant v. L-K Interior Contracting Ltd., 754762 Ontario Inc. a.k.a Tri-County Contracting and 666017 Ontario Limited, Respondents; United Brotherhood of Carpenters and Joiners of America Local Union 785, Complainant v. L-K Interior Contracting Ltd. 754762 Ontario Inc. a.k.a Tri-County Contracting and 666017 Ontario Limited, Respondents; United Brotherhood of Carpenters and Joiners of America Local Union 785, Applicant v. L-K Interior Contracting Ltd., 754762 Ontario Inc. a.k.a Tri-County Contracting and 666017 Ontario Limited, Respondents; United Brotherhood of Carpenters and Joiners of America Local Union 785, Applicant v. L-K Interior Contracting Ltd., 754762 Ontario Inc. a.k.a Tri-County Contracting and 666017 Ontario Limited, Respondents

Construction Industry - Construction Industry Grievance - Damages - Evidence - Practice and Procedure - Related Employer - Remedies - Sale of a Business - Unfair Labour Practice - Board declining to hear witness called in reply on ground that the evidence ought to have been part of the respondent's case in chief - Board finding respondents engaging in related activities under common control or direction - Respondents asking Board to decline to issue related employer declaration because of union's delay - Board applying KNK Limited case and granting declaration sought from the date the respondents became one employer - Damages in related employer application not awarded - Sale of a business application dismissed - Grievance partially upheld and damages awarded - Unfair labour practice complaint partially upheld

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members W. N. Fraser and H. Kobryn.

APPEARANCES: N. L. Jesin, K. Ball and J. Gross for the applicant; Frank Carere, Rudy Lipowitz and Doug Cox for the respondents on August 6, 1991; Rudy Lipowitz and Doug Cox for the respondents on November 4, 1991; Rudy Lipowitz for L-K Interior Contracting Ltd. and 666017 Ontario Limited, and Doug Cox for 754762 Ontario Inc. a.k.a Tri-County Contracting on November 5 and 6, 1991.

DECISION OF THE BOARD; December 9, 1991

- 1. The name of the respondent L.K. Interior Contracting Ltd. is amended to "L-K Interior Contracting Ltd."
- 2. "666017 Ontario Limited" was added as a respondent in all of these matters at the end of the first day of the hearing on August 6, 1991, subject and without prejudice to any arguments the respondents might wish to make subsequently.
- 3. These matters were heard together. Board File No. 0980-91-G is a referral to the Board of a grievance in the construction industry pursuant to section 124 of the *Labour Relations Act*.

Board File No. 0981-91-U is a complaint under section 89 of the Act in which the United Brother-hood of Carpenters and Joiners of America Local Union 785 ("Local 785") alleges that the respondents have breached sections 64, 66, 67 and 70 of the Act. Board File No. 0982-91-R is an application under section 63 of the Act in which Local 785 alleges that there has been a sale of a business by L-K Interior Contracting Ltd. ("L-K") and 666017 Ontario Inc. to 754762 Ontario Inc. a.k.a. Tri-County Contracting ("Tri-County"). Board File No. 0983-91-R is an application for relief under section 1(4) of the Act in which Local 785 pleads that the respondents constitute and should be treated as one employer for purposes of the Act.

- 4. In the course of the first day of hearing, the respondents other than 666017 Ontario Limited (which was added as a respondent later), through their counsel (who represented them at the first day of hearing only), conceded that the relationship between them was such that the prerequisites for a declaration, under section 1(4), that they constitute one employer for purposes of the Act did exist. That is, the respondents L-K and Tri-County conceded that they are separate entities which carry on associated or related activities or businesses under common control or direction. In argument at the conclusion of the evidence, Tri-County (then represented by Mr. Cox) made an attempt to resile from that concession. It would have been unfair to Local 785 to have permitted any respondent to resile from that concession at that stage of the proceeding and we therefor did not allow Tri-County to do so.
- 5. The respondents did, however, indicate that they would argue that the Board should nevertheless exercise its discretion to not issue a declaration or grant other relief under section 1(4) because Local 785 was guilty of inordinate delay in pursuing its application in that respect.
- 6. We wish to note that Mr. Cox, who was representing Tri-County at the time, sought to call a witness in reply to testify with respect to the knowledge that respondent asserted Local 785 had of Tri-County and the relationship between it and L-K prior to these proceedings. Mr. Cox advised the Board that he had not sought to call this witness previously because he was not sure that the witness was "available" to testify. The Board unanimously upheld Local 785's objection to this and ruled that what Mr. Cox described was not proper reply evidence because it ought to have been part of the respondent's case in chief. In our view, it would have been unfair to Local 785 to permit Tri-County (or any other respondent) to split its case in such a manner.
- 7. In the course of his submissions with respect to Local 785's objection to the reply evidence he sought to call, and in final argument, Mr. Cox reminded the Board that he was a small businessman and not a lawyer, which we took to be a kind of plea for greater latitude and in mitigation on the merits of the matters herein.
- 8. Persons involved in proceedings before the Board are entitled to appear before it with or without counsel or other representation. The Board is sensitive to the difficulties faced by persons who appear before it unrepresented by counsel. Consequently, the Board generally, and as we did in this case, gives such persons somewhat greater latitude in the manner in which they conduct their case than would normally be afforded to counsel. However, the Rules of Procedure and the law applicable to issues raised in the proceedings before the Board are the same for all parties, whether they appear with counsel or not. Choosing to not retain counsel, or otherwise failing to inform itself does not relieve a party of the obligation to prove its case. The considerations of onus, procedural rules (particularly those based in fairness) and the law apply equally to parties which appear without counsel and those which appear with counsel. A party which chooses to not retain counsel, or fails to obtain the appropriate legal advice, or otherwise fails to inform itself, must live with the consequences of exercising that choice. Certainly, it cannot expect to find itself in a more advantageous position procedurally or in law because it has chosen to not retain counsel.

- Because of the concessions of the respondents other than 666017 Ontario Limited, we find it unnecessary to review in detail the evidence of the relationship between L-K and Tri-County. However, we do observe that, on the evidence before the Board, L-K and Tri-County are clearly separate entities which operate under common control or direction and are engaged in associated or related activities or businesses. The evidence reveals that Rudy Lipowitz and his spouse Renate Lipowitz each own 50 per cent of 666017 Ontario Limited which in turn owns 95 per cent of L-K. Rudy Lipowitz and Cox each own 50 per cent of Tri-County. Rudy Lipowitz is also the president and one of the two directors (Renate Lipowitz being the other) of 666017 Ontario Limited. He is also the vice-president, treasurer and one director (Cox is the other, as well as the president, secretary/treasurer and general manager) of Tri-County. In his testimony, Rudy Lipowitz claimed to not take part in the day-to-day affairs of Tri-County. However, he also displayed a great deal of knowledge of its affairs. From his testimony, we are satisfied that L-K and Tri-County effectively operate together with L-K seeking larger scale projects and Tri-County going after smaller ones. Mr. Lipowitz testified that there was a flow of work between the companies and although he said that this flow was from Tri-County to L-K he also spoke of the work at 180 Frobisher Drive in Waterloo being "transferred" from L-K to Tri-County by 666017 Ontario Limited - the manager and corporate owner of L-K.
- 10. 666017 Ontario Limited was described by the respondents as acting as a holding company with respect to L-K. L-K was described as the operating company. That may be so, and the distinction may be significant for corporate, tax or other purposes, but 666017 Ontario Limited and L-K clearly operate together as a single business for labour relations purposes. The principals of both companies are the same (i.e. Rudy Lipowitz and his wife Renate), 666017 Ontario Limited owns 95 per cent of the shares in L-K, the building which houses both companies and all of the vehicles and equipment used by L-K in its operations are owned by 666017 Ontario Limited, and, pursuant to a contract between them signed and approved by the same principals on behalf of both companies, 666017 Ontario Limited manages L-K; that is, it "manages, supervises and conducts" the business of L-K, including hiring and firing L-K's employees. Notwithstanding the "independent contractor" clause in the management contract, 666017 Ontario Limited clearly owns and operates L-K. Accordingly, on the evidence before the Board, we are satisfied that 666017 Ontario Limited and L-K are properly considered to constitute one employer for labour relations purposes.
- 11. L-K and Tri-County are both conceded, and are on the evidence, one employer for labour relations purposes. In the circumstances, we conclude that 666017 Ontario Limited and Tri-County are also one employer for labour relations purposes.
- 12. In the result, we are satisfied that L-K, Tri-County and 666017 Ontario Limited constitute one employer for labour relations purposes and should be treated as such for purposes of the *Labour Relations Act*.
- 13. The respondents argued that the Board should nevertheless decline to issue a declaration to that effect. In essence, their argument was that Local 785 knew or ought to have known of the relationship between them and that the union's wilful delay in taking this action precludes them from obtaining the relief they seek under section 1(4) of the Act.
- We reject that argument. Mr. Cox's evidence in that respect boils down to an allegation that it was and is in Local 785's policy to not bring matters like the section 1(4) application herein to the Board until it has investigated them and concluded that it has a "good" case. Local 785 does not dispute this and, with respect, we see nothing wrong (and much right) with such an approach. Mr. Cox also asserted, and the union disputed, that Local 785's policy is to avoid contact with non-union companies and to, in any case, not leave clues that it has had any prior knowledge of a "con-

nection" between a unionized and non-unionized company, and further that Local 785 applied that policy in this case. There is nothing in the evidence other Mr. Cox's own testimony which supports this latter assertion. Mr. Cox showed himself to be unable to either resist the influence of self interest or be objective in his testimony, and we are not satisfied that his testimony, standing alone as it does, is a sufficient basis for concluding that Local 785 has taken such an approach, either generally or in this case. On the contrary, we are satisfied, on the basis of the evidence before the Board, that Local 785 did not have actual knowledge of the labour relations connection between the respondents prior to the events of late May, 1991 involving the job at 180 Frobisher Drive in Waterloo (and of which we shall have more to say below). We are also satisfied that Local 785 was not wilfully blind to the connection between the respondents or that there is any reason why it ought to have known of the connection prior to May, 1991. On the evidence, the labour relations connection between L-K and 666017 Ontario Limited on one hand, and Tri-County on the other began on September 6, 1988, when Rudy Lipowitz purchased a one half interest in Tri-County (actually in 516279 Ontario Inc. which used a slightly different version of the Tri-County name and to which 754762 Ontario Limited a.k.a Tri-County Contracting is clearly a successor employer something which was implicitly agreed to by the parties in these proceedings). Not only was this transaction or the subsequent relationship between L-K and Tri-County not advertised, but Tri-County seemed to do what it could to not advertise its presence on job sites.

- 15. Even if we were satisfied that Local 785 knew or ought to have known of the relationship between the respondents since September 6, 1988, we would not, in the circumstances of this case, refuse to grant the declaration sought by Local 785.
- In the past, the Board has taken an applicant's delay in seeking relief under section 1(4) into account as a factor when considering whether or not to exercise its discretion in favour of making a section 1(4) declaration. In a number of cases, the Board has declined to issue such a declaration on the basis that a trade union applicant has delayed too long and without satisfactory explanation, in making its application. In that regard, we respectfully prefer and adopt as our own the Board's reasoning on that point in *KNK Limited*, [1991] OLRB Rep. Feb. 209 at paragraphs 29 to 57.
- 17. Section 1(4) is a remedial provision intended to prevent the intentional or incidental erosion of bargaining rights consequent upon the weaving of a corporate or other veil through what is, for labour relations purposes, a single business activity. To put it another way, whatever separation may exist between two or more entities for corporate, tax, or other purposes, this Board is entitled to treat them as one employer for purposes of the *Labour Relations Act* where they carry on associated or related activities or business under common control or direction. The purpose of the provision is to prevent form, or an alteration in form, from undermining a trade union's bargaining rights and the rights of employees to bargain collectively with their employer through a trade union.
- 18. Consequently, and as the Board said in K. N. K. Limited, supra, a trade union which has established that the basis for a section 1(4) declaration exists (that is, that two or more entities carry on associated or related activities or businesses with a common control or direction), and the mischief which section 1(4) is designed to prevent or remedy exists, is generally entitled to a declaration in that respect unless there are compelling labour relations policy reasons to not do so, or where such a declaration would unfairly prejudice the respondents. In that latter respect, there must be demonstrable prejudice which must be something more than becoming subject to the very bargaining rights which section 1(4) is designed to protect. A union's undue delay in the face of actual knowledge of the material facts may be a factor which the Board will consider, although the presumption in such an application is that a trade union will not know (which is the reason section

- 1(5) is in the Act). However, the Board will focus on the actual prejudice suffered by the employer entities and the contribution of the union's conduct to that prejudice. Consequently, in the absence of a clear representation by the trade union that it would not assert its bargaining rights with respect to one or more of the employer entities concerned, or a situation in which the trade union has participated in the very corporate or business structuring which is the subject of its section 1(4) application, any "delay" by a trade union will normally be factored in when the Board considers what retrospective relief, if any, is to be given a declaration or what other relief, if any, should be granted.
- 19. In this case, we are satisfied that the respondents properly constitute one employer for purposes of the *Labour Relations Act* and we see no reason to not grant the declaration sought by Local 785.
- 20. The question then becomes whether the declaration should be effective from the time which the respondents became one employer for purposes of the Act (i.e. September 6, 1988) or some later date. In argument, the respondents asked that the Board not "back date" the declaration. The only basis which we are able to discern for that request is that it would cause them financial hardship if the Board did so. That, in our view, is not a cogent reason. We are not satisfied that there is any reason to not grant Local 785 the declaration it would ordinarily be entitled to; that is, that the respondents constituted one employer for purposes of the Act since September 6, 1988, the time they began to so conduct themselves.
- In its section 1(4) application Local 785 also sought a declaration that the respondents are bound by the "present" collective agreement between the Carpenters Employer Bargaining Agency (E.B.A.) and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America (O.P.C.) effective from May 1, 1990 to April 30th, 1992 (which relates to the industrial, commercial and institutional sector of the construction industry). Local 785 did not, on a fair reading of the application, seek damages for other than the violations of section 64, 66, 67 and 70 of the Act which are complained of in the section 89 complaint herein as well. Local 785 did not specifically seek to amend its request for relief in that respect. Accordingly (and assuming we otherwise could and would) and having regard to all the circumstances, we do not find it appropriate to award damages in the section 1(4) application.
- 22. This case was litigated primarily as a section 1(4) case. Indeed, in argument Local 785 stated that it is substantially a section 1(4) case. Nevertheless, Local 785 did not abandon its section 63 application and does seek relief with respect to its section 89 complaint and its grievance in the section 124 referral to the Board.
- 23. In our view, the evidence before the Board does not establish that there was a sale of a business, within the meaning of section 63 of the Act, from any of the respondents to any of the other respondents. Local 785's section 63 application is therefore dismissed.
- On the evidence before the Board, Tri-County was engaged in the following industrial, commercial and institutional jobs to which it did not apply the terms of any collective agreement:
 - a) 180 Frobisher Drive, Waterloo in late May or June, 1991;
 - b) the K-W Real Estate Board Building in late 1990;
 - c) a Bellamy's Restaurant in Ottawa in February, 1990;

- d) Network Automation on Weber Street in Waterloo in 1991 prior to the 180 Frobisher Drive job referred to in a above;
- e) Sanyo Machine in Elmira in April, 1991;
- f) Leo Krane and Co. at 5 Hoffman Street in Kitchener in September, 1990;
- g) Crown Delivery on Trillium Drive in Kitchener in December, 1990;
- h) Nora Trading in Cambridge in July, 1990;
- i) The Guelph Jail in or about 1986 to 1988.

Although there was some reference to other jobs, including a Bellamy's Restaurant in Barrie, a Yellow Pages building in Kitchener Waterloo, and a Fisher Canada job on Frobisher Drive in Waterloo, we are unable to discern when that work was performed.

- It was conceded that L-K was bound, at all material times to the provincial collective agreement pertaining to work in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario between the Carpenters Employer Bargaining Agency (E.B.A.) and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America (O.P.C.) (the "Carpenters Provincial Agreement") in effect at the time. Accordingly, since September 6, 1988, the respondents have all been bound, as a result of their being one employer for purposes of the Act, by that collective agreement. Since Tri-County has never applied the terms of any collective agreement to any work it has done, it obviously did not apply the terms of the Carpenters Provincial Agreement as aforesaid to any of the jobs listed above. Further, although Local 785's grievance is very broadly framed, there was never any objection to its timeliness or lack of particularity. However, in referring its grievance to the Board, Local 785 referred only to a collective agreement effective from May 1, 1990 to April 30th, 1992. Taken as a whole then, the grievance, like the section 1(4) application is only with respect to alleged breaches of the Carpenters Provincial Agreement presently in effect. Accordingly, we find that the respondents breached the aforesaid collective agreement by failing to apply it to the jobs listed at (a), (b), (d), (e), (f), (g), and (h) of paragraph 24 above and Local 785 is entitled to damages with respect to those jobs and those jobs only.
- 26. With respect to the section 89 complaint, the evidence is clear that Rudy Lipowitz, a principal of all three respondents, made a conscious decision to use Tri-County to perform the lease improvement work at the 180 Frobisher Drive job so that the work could be completed, at the most "economical way". The only difference between performing the work through Tri-County rather than through L-K was that Tri-County performed it by paying lower wages and benefits than required by the Carpenters Provincial Agreement. We are satisfied that the work was "transferred", to use Lipowitz's word, to Tri-County in order to avoid Local 785 and the terms of the Carpenters' Provincial Agreement. We are also satisfied that the respondents, which we have found constituted one employer for purposes of the Act at all material times, refused to continue to employ members of Local 785 and specifically at the 180 Frobisher Drive job unless they agreed to work "non-union"; that is, under the terms and conditions other and less favourable than those stipulated in the collective agreement. When they refused to do so, these individuals were laid-off and Tri-County performed the work using other persons.
- 27. Sections 64, 66(a) and (b) and 67(1) of the Act provide that:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or

. . .

67.-(1) No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargaining with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

In our view, the respondents' proposal was intended to interfere with the representation of their employees by Local 785 and constituted an attempt to restrain those employees from exercising their rights under the Act. We are satisfied that the respondents' conduct violated sections 64 and 66(a) and (b) of the Act. Further, the respondents' actions constituted an improper attempt to bargain directly with its employees while they were represented by Local 785 with a view to avoiding Local 785 and the Carpenters' Provincial Agreement, within the meaning of section 67(1) of the Act (see, for example, *Rexwood Products Limited*, [1987] OLRB Rep. Feb. 267). On the other hand, we are not satisfied that the respondents' actions were intended or perceived by the employees to be discriminatory or threatening within the meaning of the Act. Consequently, they were not breaches under sections 66(c) or 70.

28. In summary, having regard to the evidence and representations of the parties, the Board:

- a) declares that the respondents L-K Interior Contracting Ltd., 754762 Ontario Inc. a.k.a Tri-Country Contracting and 6660167 Ontario Limited have constituted one employer for purposes of the *Labour Relations Act* since September 6, 1988;
- b) declares that the respondents are bound to the Provincial Collective Agreement between the Carpenters Employer Bargaining Agency (E.B.A.) and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America (O.P.C.) effective from May 1, 1990 to April 30th, 1992;
- c) declares that the respondents have breached the provisions of the said collective agreement by failing to apply its terms to jobs at 180 Frobisher Drive in Waterloo in May or June, 1991, the K-W Real

Estate Board Building in late 1990, Network Automation on Weber Street in Waterloo in early 1991, Sanyo Machine in Elmira in April, 1991, Leo Krane and Co. at 5 Hoffman Street in Kitchener in September, 1990, Crown Delivery on Trillium Drive in Kitchener in December, 1990, and Nora Trading in Cambridge in July, 1990;

- d) declares that the respondents have breached section 64, 66(a) and (b), and 67(1) of the *Labour Relations Act*;
- e) directs the respondents to cease and desist from bargaining directly, with respect to employment matters, with those of its employees represented by the United Brotherhood of Carpenters and Joiners of America Local Union 785;
- f) directs the respondents to abide by the terms and conditions of the collective agreement between the Carpenters Employer Bargaining Agency (E.B.A.) and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America (O.P.C.) effective from May 1st, 1990 to April 30th, 1992;
- g) orders the respondents to pay damages, for which they are jointly and severally liable, to the United Brotherhood of Carpenters and Joiners of America Local Union 785 for the breaches of the collective agreement and Act as aforesaid.

The Board is not satisfied that any further or other relief is appropriate and, more specifically, the Board is not satisfied that this is a case in which it is either necessary or appropriate to order that notices be posted or otherwise distributed by the respondents.

29. The Board shall remain seized with respect to the quantum of damages owing by the respondents (which was the basis upon which these matters proceeded) for a period of six months. The Registrar shall, if necessary, schedule a hearing before the Board in that respect upon the written request of any party. We note that Local 785 is entitled to only a single measure of damages.

2540-90-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Volkswagen Canada Inc., Respondent v. Group of Employees, Objectors

Certification - Evidence - Petition - Practice and Procedure - Witness - Witnesses discussing evidence with others despite Board order excluding witnesses - Board finding witnesses' testimony so weakened that its probative value negligible - Board not conclusively determining non-pay allegation - Board satisfied that Form 9 declarant conducted thorough enquiry and that Form 9 reliable - Even if non-pay allegation sustained, Board would do no more than discount cards collected by particular collector - Union would still be left in certifiable position - Board finding petition not voluntary expression of true wishes of employees signatory - Certificate issuing

BEFORE: Susan Tacon, Vice-Chair, and Board Members J. A. Ronson and C. McDonald.

APPEARANCES: B. Chercover, Wayne McKay and Michael Hinch for the applicant; Joseph Liberman, Dave Lewis and Don McQuirter for the respondent; D. Turner (from July 22rd onward), C. Katz (prior to July 22nd), Ralph Grasmeyer, Donald Gregory and Kevin Shuttleworth for the objectors.

DECISION OF THE BOARD; December 19, 1991

- 1. This is an application for certification in which the Board conducted an inquiry into the voluntariness of the petition filed in opposition to the application and an inquiry into a non-pay allegation. Both these issues are dealt with in further detail below. The parties did meet with a Board Officer and did resolve some matters.
- 2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the Labour Relations Act.
- 3. Having regard to the agreement of the parties, the Board finds that the following constitutes a unit of employees appropriate for collective bargaining:

all employees of the respondent in the City of Barrie save and except supervisors, persons above the rank of supervisor, office and sales staff and students employed during the school vacation period.

- 4. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on January 9, 1991, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
- As noted, a statement of desire (or "petition") in opposition to the application was filed with the Board. Given the number of persons signing that petition who had previously signed membership applications, the Board commenced an inquiry into the voluntariness of the petition as, if that petition was proved voluntary, the Board would generally exercise its discretion to direct that a representation vote be held notwithstanding the level of membership support enjoyed by the applicant.
- The proceedings involved over twenty days of hearing in which some twenty-six witnesses testified. Documentary material was introduced in evidence and, as well, the Board took a view of the plant. The Board has considered the credibility of the witnesses according to the usual factors. In reaching its findings of fact, the Board has weighed and assessed the *viva voce* evidence, including the relative credibility of the witnesses, in the context of the documentary material and what is reasonably probable in the circumstances. In the Board's view, given the Board's assessment of the circumstances in which the petition was circulated, it would not serve the parties well nor is it necessary for the Board's decision herein to contain an exposition of the facts in great detail nor to resolve every minor discrepancy in the testimony as between witnesses or every minor inconsistency in a particular witness's testimony. The Board intends to sketch only its most relevant factual findings. Except as noted, the Board regards the witnesses as, for the most part, sincerely trying to give evidence about events occurring some months earlier and to resist the influence of self-interest to tailor that evidence.
- 7. The Board must comment on the testimony of four witnesses called by the applicant,

- namely, R. Kerr, J. Sauder, C. Ingram and J. Alksnis. Notwithstanding a Board order excluding witnesses in which the Board cautioned potential witnesses that they must not discuss their evidence with other persons whom they knew would be or might be witnesses, the four acknowledged in cross-examination that such discussions had taken place following the Board's direction, including on the evening prior to their giving evidence. The parties addressed that issue in argument. The Board regards this as a serious matter. Such directions are given by the Board, when requested by a party, to ensure as far as possible that the best evidence, untainted by tailoring or even innocent reconstruction of events, is before the Board. Violation of such a Board direction in effect undermines the integrity of the adjudication process. In the circumstances, the testimony of the four is so weakened that its probative value is negligible and that testimony is discounted.
- 8. The Board first deals with the non-pay allegation with respect to the facts, the argument and the decision, and then does likewise with regard to the petition. It is useful to note that, in view of the number of witnesses and days of hearing, the Board directed each party to file with the Board (and copy to the other parties), by a specified date following the conclusion of the evidence, what was referred to as a "factual distillation". That is, the parties filed a written account of the facts which each asserted the Board should find on the evidence, including their assertions as to credibility. The Board then heard the parties' oral representations on the jurisprudence and the relationship between the instant (asserted) facts and that jurisprudence. In the Board's opinion, this process facilitated those representations. Further, the submissions could more readily focus on the relationship between the asserted facts and the jurisprudence as the Board (and the other parties) had the opportunity to review each party's view of the facts. In the decision, the Board merely presents a highly condensed summary of the able and thorough submissions of counsel.

THE NON-PAY ALLEGATION

- 9. The Board summonsed four witnesses with respect to the allegation that Mike Bertram did not pay one dollar in connection with his application for membership in the union (the "CAW").
- 10. Mike Bertram testified that he did not pay the one dollar fee when he completed the application for membership although he conceded he signed the union card in the portion acknowledging payment of that fee. Bertram named Laird Shaughnessy as the card collector although Larry Eadie's name appeared as collector on the card itself. Bertram testified that no one but Shaughnessy was present at the time the card was collected.
- 11. Shaughnessy stated that he recalled talking to Bertram about the union but could not remember whether he had collected a card from Bertram. Shaughnessy testified that his role in the union organizing campaign was minimal; he spoke with a number of individuals about the CAW but actually collected only one or two cards. Shaughnessy's knowledge of the organizing process and card collection requirements stemmed from his involvement in organizing an employees' association some years ago. His best recollection, albeit of a general nature, was that he would have collected the one dollar fee for cards, as that was required. The Board confirmed to the parties that Shaughnessy's name appeared as collector on only one card of those submitted to the Board by the CAW in support of their certification application.
- Eadie testified that he had been given instructions as to the requirements for collecting cards. He, too, had only been minimally involved in collecting cards and, indeed, stated he later signed the petition opposing certification. The Board confirmed to the parties that Eadie's name appeared as collector on five cards, including that of Bertram. Eadie had no specific recollection of collecting Bertram's card but repeatedly stated his conviction that he must have received the one dollar fee, as indicated on the face of the card, because he had collected cards "legally".

- 13. Wayne McKay, the CAW official responsible for coordinating the organizing drive, testified about the instructions given to collectors directly by him and/or through the main in-plant organizer. McKay also testified as to his detailed questioning of Eadie and Shaughnessy with respect to the cards each collected, reviewing specifically in regard to each card, that the collector had collected the one dollar fee and that the collector shown on the card was the actual collector of that card. McKay stated that one Eadie's cards submitted initially (Shaughnessy's card) contained an error and that card was returned to Eadie to be corrected. When that correction was not forthcoming, McKay eventually personally collected a new card properly completed for Shaughnessy. McKay recalls specifically asking Eadie about Bertram's card because McKay was unsure of Bertram's first name as shown on the card.
- 14. In argument, each counsel reviewed the evidence and the jurisprudence in support of their respective positions. Counsel for the employee objectors submitted that the evidence in connection with Bertram's card brought the validity of the Form 9 into question to the point where all the membership evidence was under a cloud and the application for certification should be dismissed. Counsel for the company, while indicating that there was no suggestion that McKay was involved in any fraud on the Board, also argued that the union must be held responsible for the non-pay and the certification application should be dismissed. In the alternative, counsel asserted that all of the cards submitted by Shaughnessy and Eadie should be discounted. Counsel for the union contended there was no basis on the evidence to impugn the integrity of the Form 9 and, consequently, opposed the outright dismissal of the application. With respect to the specific non-pay allegation regarding Bertram's card, counsel submitted the evidence was equivocal and the Board could rely on the face of the card to conclude Bertram did pay the one dollar but, at most, that card alone should be discounted.
- The jurisprudence was not disputed by the parties, although they differed as to where 15. the instant facts properly fell. In a number of cases, the Board has dealt with non-pay allegations and differentiated between irregularities in the collection of membership evidence committed by union officials versus in-plant organizers, and has set out these standards required of Form 9 declarants: Pebra Peterborough Inc., [1988] OLRB Rep. Jan. 76; The Watson Manufacturing Company of Paris Limited, [1967] OLRB Rep. Dec. 862; Laidlaw Wire of Canada Ltd., [1985] OLRB Rep. Oct. 1479; Dough Delight Ltd., [1986] OLRB Rep. May 603; Belair Restoration (Ontario) Inc., [1987] OLRB Rep. Feb. 183; Crock & Block Restaurant and Tavern, [1980] OLRB Rep. Apr. 424; Daltons (1834) Limited, [1982] OLRB Rep. April 567; Olympia Floor & Wall Tile Company, [1987] OLRB Rep. May 762; Kitchener News Company Limited, [1980] OLRB Rep. Nov. 1656; Webster Air Equipment Company (1958), 58 CLLC ¶18,110; Colling Shipyards, Division of Canadian Shipbuilding & Engineering Ltd. et. al. (1967), 67 CLLC \$\int_{16,017}\$; Lilo-Rail of Canada Limited, [1983] OLRB Rep. May 672; Dominion General Manufacturing Limited, [1985] OLRB Rep. Aug. 1187. The thrust of the caselaw is that the Board must be assured of the highest standards of integrity with respect to the membership evidence given its hearsay nature. The consequences for failing to comply with those standards reflect, in appropriate proportion, the seriousness of the lapse, ranging from an isolated bona fide loan by an inexperienced in-plant collector to a failure by the Form 9 declarant to make the requisite enquiries. The latter example is the most serious and leads to the dismissal of the application on the ground that the Board cannot rely on any of the membership evidence filed in support of the application.
- 16. In the instant case, the Board need not conclusively determine the issue as to whether Bertram did or did not pay the one dollar fee, as indicated on the face of the union card and signed by Bertram. The Board is fully satisfied that the evidence clearly establishes that McKay, as Form 9 declarant, conducted the thorough enquiry necessary in filing that document. The Board is fully satisfied that the Form 9 is reliable. This conclusion would hold whether or not the Board found

that Bertram had not paid the one dollar fee. That is, at its highest, were the Board to find the non-pay allegation was sustained, the Board would do no more than discount all of the cards collected by Eadie and Shaughnessy. This would still leave the applicant in a certifiable position without the necessity of a vote, pending the outcome of the Board's enquiry into the voluntariness of the petition. Even if the non-pay allegation was upheld (and, as noted, the Board need not make that determination), the irregularity was of a nature that only Eadie (and perhaps Shaughnessy) were culpable and that irregularity was concealed from McKay despite his careful enquiries. The Board's jurisprudence properly does not hold the union at risk of the dismissal of its application in such circumstances.

17. For these reasons, then, the Board would not dismiss the certification application on the basis of the non-pay allegation and proceeds to deal with the petition.

THE PETITION ENQUIRY

- The Board considers it appropriate to first outline the parties' positions. All counsel reviewed the evidence in the context of the jurisprudence. The principles enunciated in the caselaw were not in dispute and the cases referred to covered a wide variety of circumstances in which the Board has considered the voluntariness of the petitions. Cases cited by counsel included: F.W. Woolworth Co. Limited, [1982] OLRB Rep. May 797; Parker's Dye Works & Cleaners Limited, Toronto, [1974] OLRB Rep. Dec. 859; Willow Manufacturing Company Limited, [1980] OLRB Rep. July 1131; Autotube Limited, [1984] OLRB Rep. Mar. 400; Elgin Handles Limited; [1987] OLRB Rep. Apr. 496; Pyrotenax of Canada Ltd., Trenton (1960), 60 CLLC ¶16,170; Radio Shack, [1978] OLRB Rep. Nov. 1043; Pigott Motors (1961) Ltd. (1963), 63 CLLC Dec. ¶16,264; Baltimore Aircoil Interamerican Corporation, [1982] OLRB Rep. Oct. 1387; Picker International Canada Inc. [Unreported, Board File 1762-88-R, Dec. 19, 1988]; Chapleau Forest Products Limited, [Unreported, Board File 1062-90-R, Dec. 14, 1990]; Markham Hydro Electric Commission, [1984] OLRB Rep. Oct. 1481; Nichiran Inc., [Unreported, Board File 2200-90-R, Sept. 26, 1991]; Leamington Vegetable Growers' Co-operative Limited Operating as, G. Smith Produce Company, [1974] OLRB Rep. June 402; Ontario Hospital Association (Blue Cross), [1980] OLRB Rep. Dec. 1759; VME Equipment of Canada Ltd., [Unreported, Board File 2372-86-R, July 8, 1987]; Linread Canada Limited (1965), 65 CLLC July \$\frac{1}{16,050}\$; Morgan Adhesives of Canada Limited, [1975] OLRB Rep. Nov. 813; Thornton Sand & Gravel Limited, [1987] OLRB Rep. Oct. 1331; Lyman Tube, [1980] OLRB Rep. Oct. 1472; Universal Cooler, a Division of Sno-Boy Coolers Limited, [1967] OLRB Rep. Sept. 546; Dad's Cookies Ltd., [1976] OLRB Rep. Sept. 545; Canada Dry Bottling Company Ltd., [1987] OLRB Rep. March 337; Mac-Wood Machine Limited, [1975] OLRB Rep. Nov. 842; Vered & Harvey Company Limited known as Almont Hotel, [1971] OLRB Rep. Nov. 736; Formosa Spring Brewery, [1974] OLRB Rep. Sept. 604; Buntin Reid Paper, [1983] OLRB Rep. April 487; Browning - Ferris Industries, [1982] OLRB Rep. June 816; Minnova Inc., [1991] OLRB Rep. May 644; Cooper Corrugated Containers Ltd., [1983] OLRB Rep. Nov. 1986.
- 19. Counsel for the employee objectors argued that the evidence satisfied the onus and established that the petition was voluntary. Counsel requested the Board to direct a representation vote. Counsel for the company concurred, stressing that there was no credible evidence on which to conclude that management was or would be reasonably be perceived to be involved in the petition. Not surprisingly, counsel for the union disagreed and asserted the onus had not been met, the petition was involuntary on the reasonable perception branch of the Board's jurisprudence and asked that the union be certified. Given the Board's conclusion with respect to the voluntariness of the petition, the Board need not deal with the alternative argument of union counsel which focused

on specific aspects of the petition and possible overlapping signatures with those who signed union cards.

- 20. In summarizing the parties' representations so briefly, the Board wishes to reiterate its view that it is in large part because of the able and thorough submissions of counsel and the factual distillations filed in advance with the Board that the Board is in a position to determine the application expeditiously.
- 21. Apart from minor involvement by a few other employees, three persons were responsible for the petition: Ralph Grasmeyer, Don Gregory and Kevin Shuttleworth. Almost two hundred signatures were collected on the petition in the space of a few days. The Board heard detailed testimony as to the circumstances in which each signature was obtained. While the Board has considered the evidence on the basis noted in paragraph 6 above, the Board sees no need to relate that evidence in detail herein.
- The cases noted above, and others, outline the framework in which petitions are considered by the Board. It is trite but necessary to reiterate the fundamental proposition that the Board must be satisfied that the signatures represent the voluntary wishes of the employees and that the onus lies upon the petitioners to so satisfy the Board. The Board is concerned specifically with those persons who signed the petition but who had previously signed membership cards in support of the applicant trade union. The cases are replete with reference to the Board's concern that this "change of heart" must not be motivated by fear of employment consequences for refusing to sign a petition. The Board is cognizant of and sensitive to the responsive nature of the employer employee relationship. Thus, where there is evidence of actual management involvement in the origination and circulation of the petition, where, for example, a foreman circulates a petition, the Board has concluded that document is not a voluntary expression of the employees' true wishes. Even absent actual managerial involvement, the Board has considered the evidence from the perspective of the "reasonable employee", often referred to as the "reasonable perception" test. That is, if the Board is satisfied that an employee would reasonably perceive that management condoned the petition and would likely become aware of those signing (or refusing to sign), the Board has regarded such a document as not voluntary. The Board has repeatedly stressed that each case must be determined in the context of the the specific circumstances. No single factor is necessarily determinative of the issue and the Board has had regard, as well, to the cumulative impact of the circumstances.
- 23. The Board has concluded that the ordinary employee would reasonably fear that management would learn of those employees refusing to sign the petition. The Board's conclusion is this regard is grounded primarily on the evidence of the petitioners themselves with respect to the circumstances in which the petition was circulated.
- 24. Kevin Shuttleworth candidly acknowledged that he obtained signatures in the foundry by going from work station to work station. While his normal duties did include movement in the foundry, this pattern of activity was not usual. Shuttleworth and Ralph Grasmeyer were in frequent contact during the work day while the petition was being circulated. This pattern of activity was also unusual and was noted by other employees. Grasmeyer, too, went from work station to work station in several departments soliciting signatures from employees at their machines. Don Gregory circulated the petition on the night shift in a similar fashion. Grasmeyer and Gregory are in the maintenance department and are readily identifiable because of that department's uniform. Their duties do involve some movement throughout the plant and, at the relevant period, the maintenance department was in some flux because of the relocation of the maintenance work area from one end of the plant to another. However, the Board finds that this movement throughout

the plant during the period the petition was circulated was highly unusual even in the context of the department's relocation and was not reflective of the normal pattern of activity required by their duties.

- The name of Ivy Walton appeared on the petition and was disclosed to the parties. The Board finds that her status at the time of acting supervisor in quality assurance was common knowledge. Even accepting the petitioners' evidence that employees would only see the single page of the petition each signed, the Board regards the supervisor's signature on the petition as having a serious impact on the reasonable perception of the other employees that management would become aware of those employees who did and did not sign. This impact remains the same even if Walton signed innocently believing she could do so because her status as a supervisor was only "acting". Moreover, the Board is satisfied that the fact of this signature would more likely than not come to the knowledge of employees other than those signing below Walton on that one page.
- It is not necessary to further illustrate the Board's conclusion that the petition fails on 26. the reasonable perception branch of the jurisprudence. The Board accepts that the petitioners were sincere in their opposition to the union. However, all three acknowledged they were rapidly identified as the persons circulating the petition. Gregory and Shuttleworth candidly testified that, shortly after they commenced collecting signatures, many employees (singly or in small groups and including those who initially declined to sign), sought out the petitioners at their work stations and as they walked through the various departments in order to add their names to the petition. The Board is not satisfied that those employees who signed the petition when approached at their work station during working hours or those who initially refused but quickly changed their minds or those who approached the petitioners to sign were acting out of a firm opposition to the union or a change of heart by those who had signed union cards. Rather, in the Board's opinion, the tactics of the petitioners - even if unwitting - of methodically canvassing employees at their work stations during working hours resulted in a reasonable perception by employees that management would learn of their refusal to sign. Those signatures could not, in the circumstances of that workplace, be regarded as voluntary.
- 27. For the foregoing reasons, the Board finds the petition is not a voluntary expression of the true wishes of the employees signatory. Given the level of support enjoyed by the applicant trade union, the Board certifies the applicant in respect to the bargaining unit described in paragraph 3 above.

1319-91-R; 1320-91-R United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463, Applicant v. Waylok Air Conditioning Limited, Respondent; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 599, Applicant v. Waylok Air Conditioning Limited, Respondent v. Group of Employees, Objectors

Certification - Construction Industry - Evidence - Membership Evidence - Reconsideration - Board holding that "certificate" of membership filed by applicant not evidence of membership at all - Board not permitting one local to rely upon membership evidence of another local in application pertaining to ICI sector of the construction industry - Request for reconsideration dismissed

BEFORE: Louisa M. Davie, Vice-Chair, and Board Members J. Trim and C. A. Ballentine.

APPEARANCES: L. C. Arnold, Dennis Carter and Brian Christie for the applicant; Bruce W. Binning and Wayne Klager for the respondent; M. Belleau and B. Van Ekelenburg for the objectors.

DECISION OF THE BOARD; December 16, 1991

- 1. This is a request for reconsideration of the decision of the Board dated August 8, 1991 (now reported at [1991] OLRB Rep. Aug. 1016). In its decision the Board dismissed an application for certification brought by Local 463 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and a concurrent application for certification brought by Local 599 of the same international trade union. For ease of reference the international trade union will hereinafter be referred to as the "U.A." while the two applicant locals will be referred to as "Local 463" and "Local 599". In its decision the Board stated inter alia that membership evidence in Local 599 could not be used to support an application for certification brought by Local 463. Similarly membership evidence in Local 463 could not be used in support of the application by Local 599.
- 2. The Board further noted that in view of its decision with respect to that membership evidence it was not necessary to determine "the sufficiency or propriety" of certain other documents purported to be "evidence of membership" in U.A. Local 46.

Submissions of the Parties

3. By letter dated August 16, 1991, counsel for the applicants requested reconsideration of that decision. It is helpful to set out verbatim the relevant written submissions made in support of this request for reconsideration:

• • •

The grounds upon which the Applicants seek review include that in reaching its Decision, the Board appears not to have applied the provisions of the Provincial Bargaining Sections of the Act, and, in particular, the provisions of Section 144. It is submitted that Section 144 provides the framework for all Applications for Certification in the Construction Industry.

Section 144 states, in part, as follows:

144.-(1) An application for certification as bargaining agent which relates to the industrial, com-

mercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

- (2) If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade unions on whose behalf the application is brought, or, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade unions on whose behalf the application is brought, the Board shall certify the trade unions as the bargaining agent of the employees in the bargaining unit and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.
- (3) Notwithstanding subsection 119(1), a trade union represented by an employee bargaining agency may bring an application for certification in relation to a unit of employees employed in all sectors of a geographic area other than the industrial, commercial and institutional sector and the unit shall be deemed to be a unit of employees appropriate for collective bargaining.

The effect of subsections (1) and (2) is to permit an I.C.I. Sector Application for Certification to be brought by an Employee Bargaining Agency (EBA), which in these cases would be the Ontario Pipe Trades Council and the U.A. International (EBA's as designated by the Minister of Labour) or one or more (in this case two - Local 463 and Local 599) Affiliated Bargaining Agents (ABA's). Regardless of the identity of the Applicant, provided it is either an EBA or an ABA, these Certification Applications are deemed by subsection (1) to be brought on behalf of all ABA's, which are, in these cases, all of the U.A. Locals in Ontario referred to in the Employee Bargaining Agency Designation. These ABA's include Locals 46, 463, and 599, and the appropriate I.C.I. Bargaining Unit includes all employees who would be bound by the Provincial Agreement.

Thus all Plumbers, Steamfitters, and their respective apprentices (as described in the Designation) employed by the Respondent in the I.C.I. Sector throughout Ontario are included in the Bargaining Unit. As the I.C.I. portions of the Applications are made on behalf of all Ontario Locals which are ABA's described in the Designation, it would, we submit, necessarily follow that all Journeymen and Apprentice Plumbers and Steamfitters who are by the terminal date members of any such ABA and are employed by the Respondent in the I.C.I. Sector are to be included in the Bargaining Unit. For this reason membership evidence of those employees of the Respondent who are members of Locals of the U.A. other than the Applicant is relevant. Section 144(2) specifically provides for this in stating that, "... if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade unions on whose behalf the application is brought ..."

[emphasis added]

- 4. A number of other submissions were made by counsel. However, the panel has determined that those submissions are either erroneous in their reference to the applicable law, insufficient to warrant reconsideration or, no longer relevant in the circumstances of this case as described in paragraph 7 herein. We therefore do not propose to deal with those submissions.
- 5. Counsel for the respondent (hereinafter referred to as "Waylok" or "the employer") opposed the request for reconsideration by letter dated September 3, 1991.
- 6. The Board scheduled a hearing to hear the evidence and representations of the parties with respect to *inter alia* the issues raised in the letter from counsel for the applicant dated August 16, 1991 and the adequacy and sufficiency of purported membership evidence filed on behalf of a member of U.A. Local 46. That hearing took place on October 2, 1991.
- 7. Subsequent to the hearing, counsel for Local 463 wrote to the Board indicating that Local 463 had filed a new application for certification. Counsel noted:

As you are aware, we represent the Applicant in the above matter, and have today filed a new application for Certification on behalf of such Applicant.

Contemporaneously we are requesting on behalf of Plumbers Local 463 that their Application for Reconsideration of the Board's Decision of August 8, 1991 be withdrawn, and, in the result, that the said Application in Board File No. 1319-91-R be withdrawn.

We would ask you to note that the Application for Reconsideration and the Application for Certification of Plumbers Local 599 with respect to Waylok Air Conditioning Limited (Board File No. 1320-91-R) continue before the Board and remain unaffected by the withdrawal in Board File No. 1319-91-R.

Having regard to this correspondence the request for reconsideration in Board File No. 1319-91-R is hereby dismissed.

- 8. It is noted that the new application for certification filed by Local 463 does not relate to the ICI sector or Board area #18 (the Board area referred to in Board File No. 1320-91-R). Further fresh membership evidence was filed in a timely manner by Local 463 to support its new application. As a result of these events, it is unnecessary for this Board to address in this request for reconsideration the complex issues raised during the hearing of October 2, 1991 as they related to the contemporaneous filing of two applications for certification, each of which related in part to the industrial, commercial and institutional sector of the construction industry ("the ICI sector") and the use of the same membership evidence to support each of the applications.
- A number of employees appeared at the hearing and made submissions to the Board. A timely petition objecting to Local 599's certification application was filed by employees. Mr. Van Ekelenburg, one of the employees spoke in a representative capacity for the objecting employees. Mr. Belleau the other employee desired to "speak for himself". The substance of the submissions of these employees dealt with issues pertaining to the list of employees relevant to the application for certification and other issues relating to the "merits" of the application. In the result we have determined that it is not necessary to deal with those submissions.
- 10. The only issue raised in the request for reconsideration which needs to be addressed is that which relates to the membership evidence. That issue is two-fold. The first is the sufficiency or

propriety of the proof of membership documents filed on behalf of a "member" of Local 46. The second is the use of membership evidence in one local by another local in applications pertaining to the ICI sector of the construction industry.

Decision on the Use of "Certificates" of Membership Evidence

11. The membership evidence submitted consisted of the following documents:

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 46 (UA LOCAL 46)

CERTIFICATE OF MEMBERSHIP

I, the undersigned, DONALD BRUCE HOGARTH, the Secretary-Treasurer of the above-described UA LOCAL 46, HEREBY CERTIFY that (name of person) was a Member in good standing of UA LOCAL 46 as of July 15, 1991, and is currently Member in good standing of such Union. He has been a Member of the said Union since April 14, 1967.

The said (name of person) paid dues to UA LOCAL 46 in the amount of \$100.00 on May 29, 1991, which was, and will be, applied for dues in the amount of \$20.00 per month, for each month, from and including the month of June, 1991, to and including the month of October, 1991.

DATED at Toronto this 22nd day of July, 1991.

("Donald B. Hogarth")
DONALD BRUCE HOGARTH Secretary-Treasurer UA LOCAL 46

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 46 (UA LOCAL 46)

CERTIFICATE

I, DONALD BRUCE HOGARTH, hereby certify that the attached documents are true copies of documents taken from the records of UA Local 46 concerning (name of person), a Member in good standing of UA Local 46.

DATED at Toronto this 22nd day of July, 1991.

("Donald B. Hogarth")
DONALD BRUCE HOGARTH
Secretary-Treasurer of UA LOCAL 46

Attached to this latter document was the following:

DUPLICATE

APPLICATION FOR MEMBERSHIP

in the

[1991] OLRB REP. DECEMBER

UNITED ASSOCIATION OF OF THE PLUMBING AND PIPE FITTING INDUSTRY of the United States and Canada

Trade Plumbing		
Card Number		
Social Security Number		
Applicant		
Address		
CityState		
Local Union Number46		
Recommended by		
Report of Examining Board:		
FavourableUnfavourable		
Date of Initiation14	April	1967
(Day)	(Month)	(Year)

Applicant is aware of Section 141. Local Unions collecting part payment for initiation, and applicant fails to be heard from within three weeks, the local may declare the amount forfeited.

Local Secretary must fill in this (the Front) side of application and the Applicant the other (or Reverse) side.

PRINT all answers.

Dues begin from date of initiation.

THIS HALF OF CARD TO BE RETAINED BY LOCAL UNION FOR THEIR RECORDS.

Duplicate

PERSONAL DATA

[1991] OLRB REP. DECEMBER

City	Name	
City	(Print)	
Date of Birth (Month) (Day) (Year) Citizen: Yes	Residence	
Date of Birth (Month) (Day) (Year) Citizen: Yes		
Date of Birth	City	
(Month) (Day) (Year) Citizen: Yes		
Yes		
Relationship ————————————————————————————————————	Citizen:	
Relationship ————————————————————————————————————	No	
Have you previously requested membership in the United Association? Yes	Papers filed	
Have you previously requested membership in the United Association? Yes No Where When (Local) Where When (Month) (Year) Reason for leaving the United Association April 1967 EXPERIENCE Trade Plumbing Special Skill Apprentice	Beneficiary:	
Association? Yes	Relationship	
Yes No Where When When (Local) Reason for leaving the United Association Date of Initiation 14	Association? Yes	United
Yes No Where When When (Month) (Year) Reason for leaving the United Association Date of Initiation 14	Have you ever been a member of the United Association?	
(Local) (Month) (Year) Reason for leaving the United Association		
Date of Initiation 14 April 1967 EXPERIENCE Trade Plumbing Special Skill Apprentice		(Year)
TradePlumbing Special SkillApprentice	Reason for leaving the United Association	
TradePlumbing Special SkillApprentice		
Trade Plumbing Special Skill Apprentice	Date of Initiation14 April	1967
Special Skill Apprentice	EXPERIENCE	
	Trade Plumbing	
Experience: Years5 Months	Special SkillApprentice	
Apprenticeship: Years4 1 Months	Apprenticeship: Years4 1 Months	
Serving nov. H 4TH Completed		
Affidavit from employers in trade	Affidavit from employers in trade	

Employers:
(1)
(2)
(3)
(4)
I agree that any false statement herein made is just cause for cancellation of my membership. Yes X No
I agree without reservation to abide by all laws, rules and discipline of the United Association and its local unions, that are now in force and may hereafter be enacted.
Signature

ALL writing to be done in ink. THIS CARD TO BE RETAINED BY LOCAL UNION FOR THEIR RECORDS.

The appropriate spaces on this latter document were filled in.

- 12. Section 103(2)(j) empowers the Board "to determine the form in which" evidence of membership in a trade union "shall be presented to the Board on an application for certification ... and to refuse to accept any evidence of membership ... that is not presented in the form ... so determined." Rule 73(1) of the Rules of Procedure requires that evidence of membership be "in writing, signed by the employee."
- Given the craft structure of the construction industry the Board has accepted from craft unions within the construction industry evidence of membership other than the usual application for membership and receipt (a combination application card and receipt for the statutorily required payment in respect of initiation fees or monthly dues). In the construction industry the Board has long accepted and relied upon "proof of membership" in a trade union as opposed to "applications for membership". The Board has required that such a "proof of membership" document or certificates of membership be signed by the member, indicate that the person in question is a member in good standing of the applicant, and also indicate that monthly dues in the appropriate amount have been paid for at least one month within the six month period immediately preceding the terminal date of the application. In addition, such proof of membership document must contain a certification by an officer of the applicant union that the person signing the document is in fact a member in good standing.
- 14. The documentary evidence filed by the applicant in this instance is neither an "application for membership" nor "proof of membership". Rather it is a combination of both submitted together as constituting "membership evidence".
- 15. On its own the document entitled "Application for Membership" could not be relied upon to support this application. Dated in 1967 the application falls well beyond the one year time frame after which the Board views membership evidence as being "stale". In addition there is no

indication on the face of the application that at least one dollar was paid on account of initiation fees or monthly dues. Indeed there is some doubt that the language in the document itself is sufficient to qualify as an "application". Save for the words "application for membership" on the front side of the document (the side which must be filled out by the local secretary), there is little to indicate the signator has applied for membership. The reverse side of the document which *is* filled out by the signator refers only to personal data.

- 16. Similarly, neither the document entitled "Certificate of Membership" nor the document entitled "Certificate" on their own are sufficient to support an application for certification. Neither document is signed by the employee as required by Rule 73(1) of the Rules of Procedure.
- 17. The UA and its various locals have on numerous occasions used a document which proclaims proof of membership in the usual form which is signed by the employee/member. It was candidly acknowledged that in this instance the applicant was unable to submit such proof of membership in the usual form as the "member", the signator to the 1967 application would not sign such a document thereby indicating that he was a member in good standing.
- 18. The Board raised with the parties its concerns about the form of this evidence including the date of the original application and the use of the photocopy of a document. Counsel for the applicant submitted that although the original application was made nearly 25 years ago, the Board can be satisfied having regard to the remainder of the documentary evidence that the employee was a member in good standing of the union at the relevant time. With respect to the use of photocopied material, counsel indicated that the applicant was reviewing its files to determine if the original document containing an original signature was available. In the absence of that original he advised that the applicant may call *viva voce* evidence to "verify" the signature.
- 19. In our view, this is not a case in which the applicant is relying merely upon a photocopy of an original document. The Board has in certain instances accepted and relied upon photocopied evidence of employee wishes. Holt McDermott Mines, [1990] OLRB Rep. Mar. 267; Yonge-Eglinton Centre, [1986] OLRB Rep. Jan. 185; Buyers-Bush, [1982] OLRB Rep. Oct. 1413; Woodworker and Domtar Woodlands, [1975] OLRB Rep. Aug. 631 and Norfolk County Board of Education, [1974] OLRB Rep. Mar. 182. The circumstances in these cases were unique and the Board continues to be concerned about accepting photocopied membership evidence for the various reasons enunciated in those decisions.
- 20. The issue is not whether the Board can or should rely upon photocopy evidence. Regardless of whether the applicant had appended to its certificate the original 1962 document or a photocopy thereof our decision would remain the same. In our view the issue is whether the Board can rely upon the totality of a number of diverse documents when the individual documents standing alone would not suffice. In the circumstances of this case, we think not.
- We are of the view that the Board's longstanding practice which requires that a proof of membership document or a certificate of membership be signed by the member and indicate that the person in question is a member in good standing and has paid the appropriate monthly dues is proper and should be preserved. We therefore place no reliance on the "certificate" of membership filed in this particular instance. The form in which the "evidence of membership" is presented is not acceptable and is in our view not evidence of membership at all.

Decision on the Use of Membership Evidence of Another Local

22. For ease of reference we will occasionally use the term local union in place of the statu-

tory term affiliated bargaining agent (ABA) as generally it is the local unions or the "sister" locals of the trade union which are the designated ABA's.

- Counsel did not refer to any cases, and the Board is not aware of any cases within its own reported jurisprudence which address the issue as to whether evidence of membership in one local can be used to support an application for certification which pertains to the ICI sector brought by another local of the same union. Normally, if the membership evidence of more than one local of the trade union is to be used to support an application for certification in the ICI sector, the application is brought by the designated employee bargaining agency (EBA) pursuant to section 144(1)(a) of the *Labour Relations Act* ("the Act"). Indeed, as counsel acknowledged in this case, if the certification application had been brought by the U.A. International and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada ("the Pipe Trades Council"), the designated EBA, this issue with respect to the membership evidence would not have arisen.
- 24. In addition to the submissions contained in his letter dated August 16, 1991 which focus on the statutory language of section 144 and the scheme of province-wide bargaining in the ICI sector, counsel asserted that Local 599 should be able to rely upon the evidence of membership in Local 463 and Local 46 in its applications for reasons of "common sense". He argued that the employees who are members of Local 463 or Local 46 were in the province-wide bargaining unit in the ICI sector and would be bound by the provincial agreement applicable to the ICI sector. Their membership evidence should therefore "count". Moreover, it would be "ridiculous" to insist that a trade union seeking to organize employees in the ICI sector should be required to approach persons who are already members of one local of the trade union and ask such employees to become members of another local of the same trade union. To require an employee to expose her/himself to potential split loyalties to two locals was not necessary especially when viewed in the statutory context of the province-wide bargaining which occurs on behalf of all locals in the ICI sector.
- Counsel for Waylok submitted that although there was no case directly on point the Board's recent decision in *Freure Construction Limited*, [1991] OLRB Rep. Mar. 309 was analogous and dealt in principle with the issue raised here. *Freure Construction Limited*, *supra*, involved applications for certification brought by the Labourers' International Union of North America, Local 1081 ("Labourers") and the United Brotherhood of Carpenters and Joiners of America, Local 785 ("Carpenters"). Each applicant sought to be certified to represent employees in the ICI sector and in all other sectors in Board area #8 (the Labourers' application) or in Board area #22 (the Carpenters' application). It was not disputed that "the respondent employed no construction labourers in Board area #8 and no carpenters in Board area #22 on the date of making of [the] applications; nor is it disputed that all of the employees who might be affected by [the] applications were working in Board area #6 on the date of making of the applications [sic]."
- 26. Counsel for Waylok referred to paragraph 12 and 15 of the *Freure Construction Limited*, supra, decision which state:
 - 12. Section 144 in its present form was introduced into the Act by Statutes of Ontario 1980 Chapter 31 (Bill 73) which became effective May 1, 1980. It was the companion to subsection 137(2) which was introduced into the Act by Statutes of Ontario 1979 Chapter 113 (Bill 204) which also became effective May 1, 1980. Subsection 137(2) extended bargaining rights in the ICI sector held by an affiliated bargaining agent prior to May 1, 1980 in one or more Board geographic areas to all other affiliated bargaining agents of the employee bargaining agency designated to represent those affiliated bargaining agents. Subsection 144(1) assured that all bargaining rights in the ICI sector acquired after May 1, 1980 by an affiliated bargaining agent of a designated employee bargaining agency would be acquired province-wide on behalf of the applicant affiliated bargaining agent and on behalf of all other affiliated bargaining agents of the des-

ignated employee bargaining agency. Subsections 144(1) and (2) work together to achieve this result. Subsection 144(1) mandates a single appropriate bargaining unit. Once an applicant demonstrates adequate membership support in that unit, subsection 144(2) has the somewhat curious effect of creating two bargaining units, one confined to the ICI sector and one for all other sectors in the geographic area which the Board found to be appropriate. ...

- 15. In the view of this panel of the Board, that objective has been pursued by preserving as much of the practice which existed prior to May 1, 1980 as is consistent with a reasonable construction of section 144, and subsection 144(1) in particular. ...
- With reference to these paragraphs, counsel for Waylok argued that prior to May 1, 1980 a local of a trade union applying for certification could only support its application with membership evidence which related to that local. Section 144(1) of the Act did not change that requirement. Rather, section 144(1) merely mandates a single appropriate bargaining unit so that where an employer has employees engaged in the ICI sector in a local area and outside, the local union must have sufficient membership support within that bargaining unit in order to be certified. That membership support however has to be within the local union bringing the application.
- 28. Counsel submitted that the local trade union only acts "on behalf of" the other ABA's once it has successfully established numerically sufficient support within the single bargaining unit mandated by section 144(1) with membership evidence within the local making the application.
- 29. Paraphrased, the agency like principle underlying the scheme of province-wide bargaining in the ICI sector does not come into play *until* a local union has, on the basis of membership evidence relating to that local, established its entitlement to certification of the bargaining unit. Section 144(1) was neither designed nor intended to change the rules with respect to evidence of membership as they existed prior to 1980. Section 144 was intended and drafted merely to accommodate those employees engaged in ICI construction outside a local area who would, as a result of section 144 and the scheme of province-wide bargaining be swept into the bargaining unit.
- 30. Counsel asserted that the interpretation he submitted as correct was consistent with the Board's practice as it existed prior to 1980, a practice which he argues was intended to be preserved through the combination of sections 144(1) and 144(2). Moreover, such interpretation was equally consistent with the use of the plural "trade unions" in section 144(2). Section 144(2) envisages a successful application under section 144(1). It is only where an applicant is successful in establishing membership support within the single bargaining unit that section 144(2) grants certificates to all the other ABA's for bargaining rights in the ICI sector, together with a certificate to the local union applying for those bargaining rights it has acquired with respect to the sectors of the construction industry other than the ICI sector.
- Finally, counsel noted that the Legislature had provided a simple solution for an applicant trade union in section 144(1)(a) by specifying that an application for certification can be brought by the designated EBA. That was not done in this instance. The Board ought not to depart from its well-established, consistently applied jurisprudence that membership in one local of a trade union is not evidence of membership in another local (jurisprudence which counsel for the applicant also accepts as correct although not applicable to applications for certification which relate to the ICI sector) when that option is statutorily available to trade unions. In these circumstances and in the absence of clear and compelling policy reasons, the Board should not lightly depart from its existing practices.
- 32. We are of the view that evidence of membership in one local cannot support an application for certification brought by another local. The statutory language is somewhat ambiguous and can easily be interpreted to support the position of either party. In our view however there are a

number of policy reasons why the interpretation of the statute urged upon us by counsel for the respondent is to be preferred.

- 33. We agree that the scheme of province-wide bargaining in the ICI sector introduced in 1978 does not, and was not intended to alter the Board's long-standing and well-established practice that the Local Union applying for certification must show that more than fifty-five per cent of the employees in the bargaining unit were its members.
- 34. The scheme of province-wide bargaining becomes effective *after* the applicant local union has established its entitlement to certification. Until an applicant can show sufficient support within the bargaining unit, the bargaining rights that are thereafter granted by statute to all of the other local unions and the EBA are inchoate and undetermined.
- We agree that in certain circumstances the scheme of province-wide bargaining can impact upon the manner in which bargaining rights are initially acquired. For example, a designated EBA can obtain bargaining rights pursuant to section 144(1)(a) even though employees are not, technically speaking, "members" of the EBA. By statute the EBA is "an organization of affiliated bargaining agents.". Although section 1(1)(p) includes a certified EBA within the definition of "trade union", usually the EBA does not itself have employee members. The EBA has as its "members" the local unions who in turn have employees as members. Yet section 144(1)(a) permits the EBA to make the application for certification. This provision accommodates the fact that the EBA is the representative body of the local unions and is the entity which plays an important and vital role in the scheme of province-wide bargaining in the ICI sector.
- Where the EBA makes the application for certification it can rely upon membership evidence within all of the local unions whom it represents. Although the EBA itself has no employee members, it can rely upon the evidence of the employee members of the various locals whom it represents in province-wide bargaining to acquire bargaining rights. To this extent the statutory scheme of province-wide bargaining is recognized in the initial acquisition of bargaining rights by an applicant.
- Our decision in this case would have been much different if the EBA had made the application for certification. In that instance all of the proper membership evidence of both Local 463 and Local 599 could have been relied upon. Counsel for the applicant acknowledged that the Pipe Trades Council did not/could not make the application in this instance because of reasons internal to that EBA organization. In our view the Board's long-standing, well-established and accepted practice that one local's membership evidence can't be used to support another local's certification application should not be ousted merely for reasons peculiar to a particular EBA.
- 38. The EBA is the organization of affiliated bargaining agents or the central umbrella for an organization of the local trade unions in the ICI sector. It is the central representative body fundamental to province-wide bargaining in the ICI sector. In section 144(1) the Legislature has specifically provided that this representative agent can make an application for certification. Although they play an important role, the local unions are not the representative agent in the scheme of province-wide bargaining. The EBA is. Given these facts a local trade union which does not make use of the central entity designated to represent the local unions cannot rely upon the membership evidence of another entity (i.e. another local union) not designated to represent the local unions in province-wide bargaining to acquire the bargaining rights. In section 144(1) the Legislature has already provided the simple solution for applicants who want to rely upon membership evidence of more than one local.
- 39. In our view the use of the plural "trade unions" in section 144(2) is not determinative of

this issue. The use of the plural is equally consistent with the fact that, pursuant to section 144(1)(b) "one or *more*" ABA's can make the application. The plural usage in section 144(2) merely accommodates the fact that on occasion more than one ABA may apply to be certified. In that instance the membership evidence of both ABA's is relevant. In addition the use of the plural trade unions is necessary to ensure that in the ICI sector the certificate granted refers to the bargaining rights of all the local unions.

- We are also of the view that the use of the plural trade unions is not determinative because, if that were the case both logic and the grammar of section 144(2) would dictate that the "all other sectors" certificate issued to the successful applicant for a particular geographic area should also be issued to all other ABA's "on whose behalf" the application is brought. This is not a result contemplated or intended by the Legislature when province-wide bargaining in the ICI sector was first introduced. Province-wide bargaining and the representation of Locals by the EBA is limited to the ICI sector. It is the local union which continues to be responsible for the acquisition and administration of the "all other sectors" bargaining rights in the particular geographic region over which that local union has jurisdiction.
- 41. A result in which the local union applicant acquires both ICI bargaining rights and the all other sectors bargaining rights "on behalf of all affiliated bargaining agents of the employee bargaining agency" could lead to inter-union rivalries and have significant repercussions on the provisions of many existing collective agreements including for example provisions relating to "travel cards".
- 42. Finally we fear that to permit one local to rely upon the membership evidence of another local where that membership evidence relates to persons employed in the ICI sector could potentially unduly lengthen certification proceedings in the construction industry. In our view such a rule is more likely to lead to the litigation of disputes as to whether persons outside a particular geographic area for whom membership evidence had been submitted were employed in the ICI sector (in which case their cards would count) or in some other sector (in which case the card would not). A single rule or the clearly drawn line that all membership evidence must relate to the applicant local union avoids this potentially harmful result.
- 43. In view of all these considerations and having particular regard to the fact that the statute already provides that the EBA can apply (and then rely upon evidence of each of the local unions whom it represents) thereby avoiding these potentially harmful consequences, we are of the view that this request for reconsideration ought to be dismissed. The decision of the Board dated August 8th, 1991 is correct and is hereby confirmed.

COURT PROCEEDINGS

1213-89-U; 1224-89-U; 1225-89-U; 2034-89-U (Court File No. 87/91) International Woodworkers of America - Local 2693, Applicant v. Gravel and Lake Services Limited and The Ontario Labour Relations Board, Respondents

Bargaining Unit - Collective Agreement - Duty to Bargain in Good Faith - Evidence - Final Offer Vote - Judicial Review - Natural Justice - Practice and Procedure - Strike - Unfair Labour Practice - Voter eligibility in final offer vote limited in circumstances to persons who were employees in bargaining unit at time strike began, except where connection to workplace severed prior to date of vote - Injured employee with no expectation of returning to bargaining unit not eligible to vote - Good faith bargaining obligation not requiring employer to discuss new information with trade union prior to requesting final offer vote - Board not exercising discretion to grant unlawful strike declaration - Trade union refusal to execute collective agreement constituting breach of duty to bargain in good faith - Board directing union to execute collective agreement reflecting final offer accepted in vote - Union applying for judicial review on ground that Board had no jurisdiction to determine voter eligibility in a final offer vote - Union also submitting that Board breached rules of natural justice when it limited union's right to cross-examine and when it found a breach of the duty to bargain in the context of an unlawful strike application - Judicial review application dismissed by Divisional Court

Board decision reported at [1990] OLRB Rep. Oct. 1052 as Wilf McIntyre.

Ontario Court of Justice, Divisional Court, Rosenberg, Hartt and Austin JJ., December 4, 1991.

AUSTIN J.: (Orally) As to the substantive complaint, we are not persuaded that the Board exceeded its jurisdiction in determining who was entitled to vote under s.40(1) of the Ontario Labour Relations Act.

Two procedural objections were raised. The first was that that the Union was "charged", as it were, with an unlawful strike. It was found not to be an unlawful strike. The Union was however found to have violated s.15 of the Act, although never expressly so "charged". It was argued that this constituted a breach of natural justice.

The Board made an express finding that "the matter was litigated by all parties as though it had been specifically pleaded as 'a failure to bargain in good faith' complaint", that is, a violation of s.15. The evidence before the Board clearly established a violation of the section. We are unable in these circumstances to conclude that there was any denial of natural justice.

The second procedural objection was that the Board had improperly refused or limited a right to cross-examine. It appears to us that the Board may have erred in applying s.8 of the *Statutory Powers Procedure Act* to cross-examination. *Re Don Howson Chevrolet Oldmobile Ltd. v. Registrar of Motor Vehicle Dealers and Salesmen* (1974), 6 O.R. (2d) 39 per Houlden J., at pp.45-46.

At the same time we must have regard to the fact that the Board is and must remain in control of its own procedure. We also note that no specific allegation of wrongdoing is made by the Union. In these circumstances we are not in a position to conclude that there has been any denial of natural justice.

The application is therefore dismissed with costs fixed at \$3,500 including disbursements.





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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING NOVEMBER 1991

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2786-90-R: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Classic Masonry Contracting Ltd. (Respondent) v. Jan Litwin (Objectors)

Unit: "all journeymen bricklayers and bricklayers apprentices in the apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen bricklayers and bricklayers apprentices in the employ of the respondent in all sectors of the construction industry in the Counties Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

2787-90-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Classic Masonry Contracting Ltd. (Respondent) v. The International Union Of Bricklayers And Allied Craftsmen, Local 5 (Intervener)

Unit: "and all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Counties Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

0799-91-R: International Brotherhood of Painters and Allied Trades (Applicant) v. The Board of Governors of Exhibition Place (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener)

Unit: "all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and employees in the bargaining units for which any trade union held bargaining rights as of June 5, 1991" (4 employees in unit) (Having regard to the agreement of the parties)

0933-91-R: Labourers' International Union of North America, Local 1036 (Applicant) v. Ellis-Don Limited (Respondent)

Unit: "all construction labourers in the employ of the respondent in that portion of the District of Algoma South of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1043-91-R: International Union Of Operating Engineers, Local 793 (Applicant) v. Camaro Enterprises Limited (Respondent)

Unit: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors in the District of Rainy River, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (17 employees in unit)

1417-91-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of

the United States and Canada, Local 58, Toronto (Applicant) v. The Live Entertainment Corporation of Canada and Opera Ghost Productions Inc. (Respondent)

Unit: "all stage employees employed by the respondents in the carpentry, property and electrical departments at the Pantages Theatre, 263 Yonge Street, Toronto, Ontario, save and except stage employees in bargaining units for which any trade union held bargaining rights as of July 22nd, 1991" (16 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

1843-91-R: Communications & Electrical Workers of Canada (Applicant) v. First Choice Answering Service Inc. (Respondent)

Unit: "all employees of the respondent in the City of London, save and except the manager and those persons above the rank of manager" (10 employees in unit)

1935-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Jedspar Construction Limited (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman; and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

1985-91-R: United Steelworkers of America (Applicant) v. Laidlaw Waste System Ltd. (Respondent)

Unit: "all office and clerical staff of the respondent in the Township of Richmond, save and except supervisor, those above the rank of supervisor, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period" (5 employees in unit)

2025-91-R: International Union of Bricklayers and Allied Craftsmen, Local 8, Ontario (Applicant) v. Cane Masonry (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman and all construction labourers in the employ of the respondent in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman' (8 employees in unit)

2114-91-R: Local 47 Sheet Metal Worker's International Association (Applicant) v. Couvreurs Hogue Inc. (Respondent)

Unit: "all roofers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all roofers in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell,

save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

2143-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Tarbo Construction Ltd. (Respondent)

Unit: "all bricklayers and bricklayers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers and bricklayers' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2183-91-R: Local 47 Sheet Metal Workers' International Association (Applicant) v. Pat O'Brien Mechanical Services (Respondent)

Unit: "all journeymen sheet metal workers and registered apprentices employed by the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman, and all journeymen sheet metal workers and registered sheet metal apprentices employed in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2201-91-R: Association of Allied Health Professionals: Ontario (Applicant) v. Perth District Health Unit (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: "all paramedical employees of the respondent in the County of Perth save and except supervisors, persons above the rank of supervisor and persons employed in any bargaining unit for which any trade union held bargaining rights as of September 27, 1991" (5 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

2210-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. H & J Masonry (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2215-91-R: Teamsters Local Union 419 (Applicant) v. Mississauga Automotive Warehousing Limited, c.o.b. as Western Automotive & Industrial Supply Co. (Respondent)

Unit: "all employees of the respondent in Brampton, Ontario save and except foremen, those above the rank of foreman, office and sales staff and students employed during the school vacation period" (15 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

2221-91-R: Teamsters Local Union No. 419 (Applicant) v. Laidlaw Technologies Inc. (Respondent)

Unit: "all employees of the respondent in its medical services group in Metropolitan Toronto, save and except forepersons, persons above the rank of fore person, office and sales staff and students employed during the school vacation period" (16 employees in unit) (Having regard to the agreement of the parties)

2227-91-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the United Counties of Stormont, Dundas and Glengarry (Respondent)

Unit: "all employees of the respondent in its social services department in the United Counties of Stormont,

Dundas and Glengarry, save and except deputy administrator, persons above the rank of deputy administrator, executive secretary and persons for whom any trade union held bargaining rights as of October 1, 1991" (14 employees in unit) (Having regard to the agreement of the parties)

2228-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. G.R.S. Construction Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman; and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

2236-91-R: Canadian Union of Public Employees (Applicant) v. Construction Safety Association of Ontario (Respondent)

Unit: "all employees of the respondent in the Province of Ontario, save and except Supervisors, persons above the rank of Supervisor, Budget Coordinator, Administrative Coordinator, Coordinator Information Resources Group, Administrative Assistants, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (95 employees in unit) (Having regard to the agreement of the parties)

2241-91-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. 742967 Ontario Inc. c.o.b. as MCS Electrical (Respondent)

Unit: "all employees of the respondent in the Regional Municipality of of Waterloo, save and except forepersons and persons above the rank of foreperson" (6 employees in unit) (Having regard to the agreement of the parties)

2269-91-R: Ontario Nurses' Association (Applicant) v. Victorian Order of Nurses, Regional Municipality of Durham (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in the Regional Municipality of Durham, save and except supervisors, and persons above the rank of supervisor" (52 employees in unit) (Having regard to the agreement of the parties)

2300-91-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Waylok Air Conditioning Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices, in the employ of the respondent in the Towns of Cobourg and Port Hope, and the geographic Townships of Hope, Hamilton, and Alnwick in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2305-91-R: Labourers' International Union Of North America, Ontario Provincial District Council (Applicant) v. Dave's Custom Trenching Limited (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), and in the County of Wellington, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2307-91-R: Canadian Union of Public Employees (Applicant) v. McCauley Child Development Centre Organization (Respondent)

Unit: "all office and clerical employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and secretary to the Executive Director" (3 employees in unit) (Having regard to the agreement of the parties)

2311-91-R: Amalgamated Clothing and Textile Workers Union (Applicant) v. Premier Wire Ltd. (Respondent)

Unit: "all employees of the respondent at Alexandria, save and except forepersons, persons above the rank of foreperson, office, clerical, technical, sales staff and students employed during the school vacation period" (23 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

2320-91-R: International Union of Operating Engineers, Local 793 (Applicant) v. Ajax Paving Ind. (Canada) Ltd. (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (15 employees in unit)

2332-91-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 855436 Ontario Limited c.o.b. as LOEB Princess St. (Respondent)

Unit: "all employees of the respondent at 1225 Princess Street, Kingston, save and except department managers, persons above the rank of department manager, meat department employees, office and clerical staff and persons regularly employed for not more than 24 hours per week" (26 employees in unit) (Having regard to the agreement of the parties)

2338-91-R: Labourers' International Union Of North America, Local 183 (Applicant) v. Spring Masonry (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman" (15 employees in unit)

2361-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. CN Bricklayers Inc. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan

Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman and; all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2362-91-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 422228 Ontario Ltd. o/a Food Warehouse (Respondent)

Unit: "all employees of the respondent in the City of Thunder Bay, save and except assistant managers, persons above the rank of assistant manager, office and clerical staff" (26 employees in unit) (Having regard to the agreement of the parties)

2366-91-R: Teamsters Local Union No. 91 (Applicant) v. Set Construction (Respondent)

Unit: "all teamsters engaged on on-site construction in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all teamsters engaged on on-site construction in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2369-91-R: Amalgamated Clothing and Textile Workers Union (Applicant) v. Goody Canada Limited (Respondent)

Unit: "all office and clerical employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor, sales representatives, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (10 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

2382-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Somerset Specialties Limited c.o.b. as Trent News Company (Sales and Distribution) (Respondent)

Unit: "all employees of the respondent in the City of Cobourg, save and except supervisors, persons above the rank of supervisor, sales, office and clerical staff, jobbers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (11 employees in unit) (Having regard to the agreement of the parties)

2389-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Region Utility Contractors (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Water-loo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2390-91-R: Brewery, Malt and Soft Drink Workers, Local 304 (Applicant) v. The Corporation of the County of Simcoe (Respondent)

Unit: "all employees of the respondent in the County of Simcoe save and except foremen, persons above the rank of foreman, office and clerical staff, persons in the Homes for the Aged, persons regularly employed for

not more 24 hours per week and students employed during the school vacation period and persons for whom any trade union held bargaining rights as of October 21, 1991" (20 employees in unit) (Having regard to the agreement of the parties)

2405-91-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW (Applicant) v. The Corporation of the Township of Raleigh (Respondent)

Unit: "all employees of the respondent in the Township of Raleigh, save and except foremen, persons above the rank of foreman, office, clerical and technical staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period" (5 employees in unit) (Having regard to the agreement of the parties)

2439-91-R: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. George and Asmussen Limited (Respondent)

Unit: "all bricklayers and bricklayers' apprentice in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

2441-91-R: Canadian Union of Public Employees (Applicant) v. The Boy's Home (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except assistant supervisor, persons above the rank of assistant supervisor, office and clerical staff and persons for whom any trade union held bargaining rights as of October 22, 1991" (18 employees in unit) (Having regard to the agreement of the parties)

2463-91-R: Construction Workers Local 52, affiliated with the Christian Labour Association of Canada (Applicant) v. Mirtren Contractors Limited (Respondent)

Unit: "all construction labourers, carpenters and carpenters' apprentices, in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

2465-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Piccirillo Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman; and all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2466-91-R: Service Employees Union Local 268 Affiliated with the A.F. of L., C.I.O. and C.L.C. (Applicant) v. Lakehead University Board of Governors Lakehead University (Respondent)

Unit: "all employees of the respondent in the City of Thunder Bay, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, technical staff, office and clerical staff and persons in bargaining units for

which any trade union held bargaining rights as of October 24, 1991" (15 employees in unit) (Having regard to the agreement of the parties)

2477-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. M.R.C. Industrial Masonry Ltd. (Respondent)

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman (3 employees in unit)

2478-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Fly Masonry Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman and; all construction labourers in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2480-91-R: Service Employees Union, Local 478 (Applicant) v. The Corporation of The City of Elliot Lake (Respondent)

Unit: "all employees of the respondent in the Town of Massey, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (7 employees in unit) (Having regard to the agreement of the parties)

2483-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Wayne Pitman Ford Sales Limited (Respondent)

Unit: "all sales staff of the respondent in the City of Guelph, save and except managers, persons above the rank of manager, office and clerical staff and employees in bargaining units for which any trade union held bargaining rights as of October 30, 1991" (11 employees in unit) (Having regard to the agreement of the parties)

2485-91-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Relax Inn Limited c.o.b. as Relax Plaza Hotel Airport (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, front office and clerical staff" (19 employees in unit) (Having regard to the agreement of the parties)

2529-91-R: Canadian Union of Public Employees (Applicant) v. Hamilton Wentworth Third Sector Employment Enterprises (Respondent)

Unit: "all employees of the respondent in the Region of Hamilton-Wentworth, save and except foremen, persons above the rank of foreman, office and clerical staff, persons employed under a job entrants training plans) and persons for whom any trade union held bargaining rights on the date of application November 1, 1991" (64 employees in unit) (Having regard to the agreement of the parties)

2537-91-R: Teamsters Local Union No. 879 (Applicant) v. Laidlaw Environmental Services Ltd. (Respondent)

Unit: "all employees of the respondent at the respondents transfer facility in the City of Burlington, save and except supervisors and dispatchers, persons above the rank of supervisor and dispatcher, office and sales staff and chemical and laboratory technicians" (23 employees in unit) (Having regard to the agreement of the parties)

2563-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Conrad Painting Limited (Respondent)

Unit: "all construction labourers and all employees engaged in cement finishing, waterproofing or restoration work in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees engaged in cement finishing, waterproofing or restoration work in the employ of the respondent in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2564-91-R: London and District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The Salvation Army, Kitchener Addictions and Rehabilitation Centre (Respondent)

Unit: "all employees of the respondent in the Cities of Kitchener, Waterloo and Cambridge, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (40 employees in unit) (Having regard to the agreement of the parties)

2569-91-R: London and District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The Salvation Army Addictions and Rehabilitations Centre (Respondent)

Unit: "all office and clerical employees of the respondent in Kitchener, save and except supervisors, persons above the rank of supervisor and bookkeeper" (5 employees in unit) (Having regard to the agreement of the parties)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1879-91-R: Ontario Public School Teachers' Federation (Applicant) v. The York Region Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its elementary panel in the Regional Municipality of York, save and except persons who when they are employed as substitutes for other teachers, are teachers as defined in the School Boards and Teachers Collective Negotiations Act and persons who, when they are employed as supply teachers for replacement of summer school teachers" (609 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on list as originally prepared by employer Number of persons who cast ballots	420 131
Number of ballots, excluding segregated ballots, cast by persons whose names appear	ir on
voters' list	123
Number of segregated ballots cast by persons whose names appear on voters' list	8
Number of segregated ballots cast by persons whose names appear on voters	108
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	10
Ballots segregated and not counted	8

2000-91-R: Canadian Union of Public Employees (Applicant) v. Windsor Coalition for Development Health Care Association Regency Park Nursing/Retirement Centre (Respondent) v. Christian Labour Association Of Canada (Intervener)

Unit: "all employees of Windsor Coalition for Development Health Care Association employed at its Regency Park Lodge, Windsor, save and except supervisors persons above the rank of supervisor, office and clerical staff" (65 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on list as originally prepared by employer	72
Number of persons who cast ballots	59
Number of ballots marked in favour of applicant	36
Number of ballots marked against applicant	23

2062-91-R: Ontario Public School Teachers' Federation (Applicant) v. The Sudbury Board of Education (Respondent)

Unit: "all occasional teachers of the respondent in its elementary panel in the Regional Municipality of Sudbury, save and except persons who, when they are employed as substitutes for other teachers are teachers as defined in the School Boards and Teachers' Collective Negotiations Act" (91 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on revised voters' list	91
Number of persons who cast ballots	35
Number of ballots marked in favour of applicant	34
Number of ballots marked against applicant	1

2289-91-R: IWA-Canada (Applicant) v. A.G. Siberry Investments Ltd. c.o.b. Loeb Yorkgate (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and office employees" (126 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on list as originally prepared by employer	130
Number of persons who cast ballots	102
Number of ballots, excluding segregated ballots, cast by persons whose names appear	on
voters' list	97
Number of segregated ballots cast by persons whose names appear on voters' list	5
Number of ballots marked in favour of applicant	54
Number of ballots marked against applicant	43
Ballots segregated and not counted	5

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0235-91-R: Graphic Communications International Union, Local 500M (Applicant) v. Pro-Art Graphics Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Regional Municipality of York, save and except non-working foremen and persons above the rank of non-working foreman, office and sales staff, and persons regularly employed for not more than 24 hours per week" (18 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on list as originally prepared by employer	19
Number of persons who cast ballots	19
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	8

Applications for Certification Dismissed Without Vote

1108-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Blue River Masonry

(Respondent) v. International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Intervener) (10 employees in unit)

1155-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Blue River Masonry (Respondent) v. Labourers' International Union of North America, Local 183, Bricklayers, Masons Independent Union of Canada, Local 1 (Interveners) (5 employees in unit)

2184-91-R: Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Applicant) v. Tamar Building Products (1981) Ltd./Windsor Siding and Molding Mfg. (1981) Ltd. (Respondent) v. Group of Employees (Objectors) (17 employees in unit)

2266-91-R: Canadian Union of Public Employees (Applicant) v. The Toronto Hospital (Respondent) (700 employees in unit)

2401-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Residential Masonry Ltd. (Respondent) (23 employees in unit)

2484-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Barry Cullens Chevrolet Oldsmobile Limited (Respondent) v. Group of Employees (Objectors) (17 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0333-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ben Bruinsma & Sons Limited (Province of Ontario) (Respondent) v. Construction Workers Local 53, Christian Labour Association of Canada (Intervener)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction employees in the employ of the respondent in other than the industrial, commercial and institutional sector in the Province of Ontario, save and except non-working foremen and persons above that rank" (22 employees in unit)

Number of names of persons on list as originally prepared by employer	20
Number of persons who cast ballots	20
Number of ballots marked in favour of applicant	0
Number of ballots marked in favour of intervener	2

1011-91-R: Hotels, Clubs, Restaurants, Taverns, Employees Union Local 261 (Applicant) v. Ottawa Congress Centre/Centre des Congres D'Ottawa (Respondent)

Unit: "all employees of the respondent in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, executive chef and sous chef, security staff, maintenance staff, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (67 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on list as originally prepared by employer	35
Number of persons who cast ballots	29
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	15

1568-91-R: Sheet Metal Workers' International Association, Local 562 (Applicant) v. Welco Mechanical Inc. (Respondent)

Unit: "all journeymen and apprentice sheet metal workers in the employ of the respondent in in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice sheet metal workers in the employ of the respondent in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman" (23 employees in unit)

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	22
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	12

2151-91-R: Labourers' International Union of North America, Local 506 (Applicant) v. Can-Mar Precase Corporation (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Vaughan, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and students employed during the school vacation period" (66 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on list as originally prepared by employer	68
Number of persons who cast ballots	55
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	30

2193-91-R: Canadian Union of Public Employees (Applicant) v. Holland Christian Homes Inc. (Respondent)

Unit: "all employees of H.C.H. Nursing Homes Inc. in Brampton, save and except supervisors, persons above the rank of supervisor, and office staff" (135 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on list as originally prepared by employer	151
Number of persons who cast ballots	122
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	55
Number of ballots marked against applicant	66

Applications for Certification Withdrawn

0155-91-R: Labourers' International Union of North America, Local 527 (Applicant) v. Moffat Construction & Materials Limited, Moffat Construction (1990) Inc., Ottawa Valley Investments Limited (Respondents)

1177-91-R: International Union of Operating Engineers, Local 793 (Applicant) v. Northland Bitulithic Limited (Respondent)

1226-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. George Masonry Contractors Ltd. (Respondent)

1486-91-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Ashbridge Electrical Contractors Limited (Respondent)

1850-91-R: International Union of Operating Engineers, Local 793 (Applicant) v. Bot Construction (Canada) Limited, Clarkson Construction Company Limited (Respondents)

1927-91-R: Labourers' International Union of North America, Local 607 (Applicant) v. Whitmire Construction Ltd. (Respondent)

1948-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Toronto Dominion Bank (Respondent)

2182-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Alfonso Masonry Ltd. (Respondent)

2302-91-R: Teamsters Local Union No. 419 (Applicant) v. Western Automotive & Industrial Supply (Respondent)

- 2303-91-R: Energy and Chemical Workers Union (Applicant) v. Fisher Feed Mill Ltd. (Respondent)
- 2341-91-R; 2342-91-R; 2343-91-R; 2344-91-R; 2345-91-R; 2536-91-R: London and District Service Workers Union, Local 220, S.E.I.U., A.F.L., C.I.O. C.L.C. (Applicant) v. The Salvation Army Addictions and Rehabilitation Centre (Respondent)
- 2386-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Lodder Brothers Limited (Respondent) v. The Independent Employees Association (Intervener)
- 2388-91-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Lodder Brothers Limited (Respondent)
- **2435-91-R:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. Stouffville Foods Inc. c.o.b. as Stouffville IGA (Respondent)
- 2458-91-R: United Steelworkers of America (Applicant) v. Bingo Press and Specialty Limited carrying or business as Bazaar Novelty (Respondent)
- **2527-91-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Parkway Ford Sales (Waterloo) Limited (Respondent)
- 2550-91-R: Ontario Nurses' Association (Applicant) v. Mount Sinai Hospital (Respondent)
- **2552-91-R:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. Budget Car Rentals Toronto Limited (Respondent)
- **2577-91-R:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. Casatta Group Ltd., c.o.b. as Westlake House (Respondent)
- **2599-91-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Anglo Oriental Limited (Respondent)
- 2639-91-R; 2640-91-R: Labourers' International Union Of North America, Ontario Provincial District Council (Applicant) v. Hard-Co Excavating Ltd. (Respondent)
- 2649-91-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W. Canada) (Applicant) v. Canadian Posture & Seating Centre (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

- 1065-91-FA: Labourers' International Union Of North America, Local 1059 (Applicant) v. Strathroy Concrete Forming (1988) Inc. (Respondent) (Withdrawn)
- **1441-91-FC:** International Leather Goods Plastics & Novelty Workers' Union, Local 8 (Applicant) v. Root Chemical Company Inc. (Respondent) (*Granted*)
- **2486-91-FA:** Graphic Communications International Union, Local 500M (Applicant) v. Economy Webb Printing Inc. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1646-89-R: The International Union Of Bricklayers And Allied Craftsmen, Local 12 (Kitchener), Ontario Provincial Conference (Applicants) v. Cooper Corporation Limited, Versa Care Development Corporation (Respondents) (*Granted*)

- 1648-89-R: Labourers' International Union Of North America, Local 1059 (Applicant) v. Cooper Corporation Limited, Versa Care Development Corporation (Respondents) (*Granted*)
- 1691-89-R: United Brotherhood Of Carpenters & Joiners Of America, Local Union 2222 (Applicant) v. Cooper Corporation Limited, Versa Care Development Corporation (Respondents) (Granted)
- 1079-91-R: International Brotherhood of Painters & Allied Trades, Local 1494 (Applicant) v. Trojan Interior Contracting Ltd. and Robson Acoustics and Drywall Inc. and Lakeview Painting (1990) Ltd. (Respondents) (*Granted*)
- **1477-91-R:** Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, International Union of Bricklayers & Allied Craftsmen, Local 12 (Applicants) v. A. Gorgi Masonry (1976) Ltd., Gorgi Construction Ltd. (Respondents) (*Withdrawn*)
- **2502-91-R:** United Steelworkers of America (Applicant) v. N.I.M. Disposals Limited and Mid North Iron & Metals Limited c.o.b. as Northland Iron & Metals Limited (Respondents) (*Granted*)
- **2590-91-R:** Communications and Electrical Workers of Canada (Applicant) v. First Choice Answering Service Inc., and Triple A Answering Service Ltd. (Respondents) (*Withdrawn*)
- 2674-91-R: Textile Processors, Service Trades, Health Care Professional & Technical Employees International Union, Local 351 (Applicant) v. Almico Plastics Limited, 941151 Ontario Limited c.o.b. Almico Products (Respondents) (Withdrawn)

SALE OF A BUSINESS

- 1646-89-R: The International Union Of Bricklayers And Allied Craftsmen, Local 12 (Kitchener), Ontario Provincial Conference (Applicants) v. Cooper Corporation Limited, Versa Care Development Corporation (Respondents) (*Granted*)
- **1648-89-R:** Labourers' International Union Of North America, Local 1059 (Applicant) v. Cooper Corporation Limited, Versa Care Development Corporation (Respondents) (*Granted*)
- **1691-89-R:** United Brotherhood Of Carpenters & Joiners Of America, Local Union 2222 (Applicant) v. Cooper Corporation Limited, Versa Care Development Corporation (Respondents) (*Granted*)
- 1079-91-R: International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. Trojan Interior Contracting Limited and, Robson Acoustics and Drywall Inc. and, Lakeview Painting (1990) Limited (Respondents) (*Granted*)
- **1477-91-R:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, International Union of Bricklayers and Allied Craftsmen, Local 12 (Applicants) v. A. Gorgi Masonry (1976) Ltd., Gorgi Construction Ltd. (Respondents) (*Withdrawn*)
- **2591-91-R:** Communications and Electrical Workers of Canada (Applicant) v. First Choice Answering Service Inc., and Triple A Answering Service Ltd. (Respondents) (*Withdrawn*)
- 2674-91-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Almico Plastics Limited, 941151 Ontario Limited c.o.b. Almico Products (Respondents) (Withdrawn)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1896-91-R: We, the Unionized employees of Medigas Inc. (Applicant) v. International Union of Operating Engineers Local 793 (Respondent) v. Medigas Inc. (Intervener)

Unit: "all employees of the Intervener at 677 MacDonald Avenue, Sault Ste. Marie, Ontario, save and except supervisors, persons above the rank of supervisor, purchasing agent, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (6 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	6
Number of persons who cast ballots	6
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	6

1941-91-R: Beverley Connell (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) v. Beatrice Foods Inc., (Intervener)

Unit: "all office and clerical employees of the Employer in the City of Thunder Bay, in its Klomp-Wakefield Division, save and except supervisors, persons above the rank of supervisor, confidential secretary to the General Manager, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (12 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	12
Number of persons who cast ballots	10
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	7

2032-91-R: Amalgamated Clothing and Textile Workers Union - AFL-CIO-CLC (Applicant) v. Paramount Bedding & Upholstery Inc. (Respondent) (*Withdrawn*)

2220-91-R: Norman Mathieu and, Danny (Dragan) Pesic (Applicants) v. Labourers' International Union of North America, Local 183 (Respondent) v. 6161/6171 Bathurst Street Apartments (Intervener)

Unit: "all employees employed to perform work normally performed by Resident Building Superintendents, Maintenance Employees, General Handymen, Janitorial and/or Cleaning Staff, save and except Property Managers, Property Management Office and Clerical Staff, or Executive personnel in positions above property managers at, and out of 6161, 6171 Bathurst Street Apartment" (2 employees in unit) (Granted)

Number of names of persons on list as originally prepared by employer	2
Number of persons who cast ballots	2
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2

2250-91-R: Wes Lane, Dave Allen, Robin Roberts (Applicant) v. Carpenters & Allied Workers Local 27 (Respondent) v. Lock-Wood Ltd. (Intervener) (Terminated)

Unit: "all employees of in the Municipality of Newmarket, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (3 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	3
Number of persons who cast ballots	3
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3

2422-91-R: Keith R. Humphrys, on his own behalf (Applicant) v. United Steel Workers of America (Respondent) (Withdrawn)

2505-91-R: Timothy J. Raven (Applicant) v. Graphic Communications International Union, Local 5125 (Respondent) v. Lindsay Paper Box Company Limited (Intervener) (7 employees in unit) (*Granted*)

2515-91-R: Group of Employees Joseph Aggimenti (Applicant) v. United Steelworkers of America (Local 8300) (Respondent) (16 employees in unit) (*Granted*)

MINISTERIAL REFERENCE (CONCILIATION OFFICER)

0860-91-M: Ellis-Don Limited (Employer) v. Labourers' International Union of North America, Local 1036 (Trade Union) (Withdrawn)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

2604-91-U: Ellis-Don Construction Limited (Applicant) v. International Brotherhood of Electrical Workers, Local 353 and William Robinson (Respondents) (Withdrawn)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1810-89-U: John Clark, Carole McDonald and Tim Oribine (Complainant) v. Representatives Association Of Ontario, Local 414 of the Retail, Wholesale And Department Store Union, AFL-CIO-CLC, Retail, Wholesale and Department Store Union, AFL-CIO-CLC (Respondents) (Dismissed)

3059-89-U: United Brotherhood Of Carpenters And Joiners Of America, Local 38 (Complainant) v. Peter Kiewit Sons Company Of Canada Ltd., Labourers' International Union Of North America, Ontario Provincial District Council (Respondents) (Withdrawn)

0310-90-U: Ontario Nurses' Association (Complainant) v. The Regional Municipality Of Haldimand-Norfolk (Respondent) (Withdrawn)

2448-90-U; 0240-91-U: International Association of Machinists and Aerospace Workers (Complainant) v. D.D.M. Plastics Incorporated (Respondent) (Withdrawn)

3023-90-U: Frank T. Prindler (Complainant) v. Marsh Food Services (Respondent) (Withdrawn)

3105-90-U: International Union of Bricklayers and Allied Craftsmen Local 5 (Complainant) v. Classic Masonry Contracting Ltd. (Respondent) (Withdrawn)

3106-90-U: Labourers' International Union of North America, Local 1059 (Complainant) v. Classic Masonry Contracting Ltd. (Respondent) (Withdrawn)

0051-91-U; 3089-90-U: Edward I. Gibbs (Complainant) v. Brewery, Malt and Softdrink Workers, Local 304 (Respondent) v. Nestle Enterprises Limited (Confectionary Division) (Intervener) (Dismissed)

0205-91-U: Douglas Lavin (Complainant) v. Cement Lime & Gypsum Workers Div. of the Boiler Makers, Federal White Cement Ltd. (Respondents) (Dismissed)

0206-91-U: Douglas Lavin (Complainant) v. Federal White Cement, The United Steel Workers of America Local 9290 (Respondents) (*Dismissed*)

0229-91-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Complainant) v. Rich Products of Canada, Limited (Respondent) (Withdrawn)

0311-91-U; 1498-91-U: Service Employees Union, Local 183 (Complainant) v. Gibson Holdings (Ontario) Ltd., and Tim Gibson and Larry Gibson (Respondents) (Withdrawn)

- 0524-91-U: Helen J. Coghlan (Complainant) v. McKellar General Hospital (Respondent) v. Service Employees Union Local 268 Affiliated with the S.E.I.U. A.F. Of L., C.I.O., & C.L.C. (Intervener) (Withdrawn)
- 0525-91-U: Helen J. Coghlan (Complainant) v. Service Employees International Union (Local 268) (Respondent) (Withdrawn)
- 0561-91-U: The Ontario Secondary School Teachers' Federation (Complainant) v. The Oxford County Board Of Education (Respondent) (Withdrawn)
- 0672-91-U: Frank Ramjattan (Complainant) v. Retail, Wholesale Bakery And Confectionery Workers Union, Local 461 (Respondent) (Withdrawn)
- 0754-91-U: Orlando Morales (Complainant) v. Best Western Chestnut Park Hotel (Respondent) (Withdrawn)
- 0879-91-U: United Paperworkers International Union (Complainant) v. District of Thunder Bay Homes for the Aged Birchwood Terrace (Respondent) (Withdrawn)
- **1003-91-U:** Donald Grahl (Complainant) v. The United Steel Workers Of America, Local 3257 (Respondent) (Withdrawn)
- 1536-91-U: Henry Melnyk (Complainant) v. Teamsters Local Union 938 (Respondent) (Withdrawn)
- 1541-91-U: London And District Building Service Workers' Union Local 220 (Complainant) v. Cedarwood Acres (Respondent) (Withdrawn)
- 1650-91-U: Bruno Succi (Complainant) v. Don W. Whitty (Respondent) (Withdrawn)
- **1657-91-U:** Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Complainant) v. New Generation Drywall Ltd. (Respondent) (*Granted*)
- 1714-91-U: Donald A. Graham (Complainant) v. Rodney Bezo (Respondent) (Withdrawn)
- 1807-91-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Hyundai Auto Canada Inc. (Respondent) (Withdrawn)
- **1833-91-U:** Warner DeWolfe (Complainant) v. Ontario Hydro Employees' Union Local 1000 CUPE CLC (Respondent) v. Ontario Hydro (Intervener) (*Dismissed*)
- 1893-91-U: Ontario Public Service Employees Union (Complainant) v. The Great Lakes College Of Toronto and Nava Chelliah (Respondents) (Withdrawn)
- **2014-91-U:** Communications And Electrical Workers Of Canada (Complainant) v. First Choice Answering Service Inc. (Respondent) (*Withdrawn*)
- **2043-91-U:** The Association Of Canadian Film Craftspeople (Complainant) v. Realistic Productions Inc., Lena Cordina (Respondents) (*Withdrawn*)
- **2097-91-U:** Labourers' International Union of North America, Local 183 (Complainant) v. Maccaferri Gabions of Canada Ltd. (Respondent) (*Withdrawn*)
- 2118-91-U: London and District Service Workers' Union, Local 220 (Complainant) v. Cedarwood Village (Respondent) (Withdrawn)
- 2155-91-U: Michael Karl Kucman (Complainant) v. Canadian Union Of Public Employees (Respondent) (Withdrawn)

- **2217-91-U:** Pipeline Contractors Association Of Canada (Complainant) v. Rhucon (1988) Inc. (Respondent) (Withdrawn)
- 2232-91-U: Roman Sereda (Complainant) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 172 (Respondent) (Withdrawn)
- 2244-91-U: International Union Of Operating Engineers, Local 796 (Complainant) v. Atlantic Packaging Products Ltd. (Respondent) (Withdrawn)
- 2261-91-U: Yousef Karazi (Complainant) v. Hotel Employees Union (Respondent) (Withdrawn)
- 2285-91-U: Cecil Colgan (Complainant) v. Kim Davies, Glen Gow (Respondents) (Withdrawn)
- **2287-91-U:** Mr. Timothy Pelletier (Complainant) v. Gerry Phillips, Teamsters Local 230, Ont Hydro Lakeview Plant (Respondents) (*Withdrawn*)
- **2295-91-U:** John Dobson (Complainant) v. Canadian Union Of Public Employees Local 2713 (Respondent) (Withdrawn)
- 2308-91-U: David Tovey (Complainant) v. McDonnell Douglas and, Local 1967 CAW (Respondents) (Withdrawn)
- 2322-91-U: London And District Service Workers' Union, Local 220 (Complainant) v. Cedarwood Village (Respondent) (Withdrawn)
- **2331-91-U:** Local Union 47 Sheet Metal Workers' International Association (Complainant) v. Pat O'Brien Mechanical Services (Respondent) (*Withdrawn*)
- 2346-91-U: Daniel M. Scharf (Complainant) v. Norm Younger, A.C.T.W.U. Local 1305 (Respondents) (Withdrawn)
- 2350-91-U: Teamsters Local Union No. 419 (Complainant) v. Neate Roller Limited (Respondent) (Withdrawn)
- 2352-91-U: United Steelworkers of America (Complainant) v. International Discus Corporation (Respondent) (Withdrawn)
- 2357-91-U: Textile Processors, Service Trades, Health Care, Professional And Technical Employees International Union, Local 351 (Complainant) v. Almico Plastics Limited, Almico Products, Ian Trower, Coopers & Lybrand (Respondents) (Withdrawn)
- 2358-91-U: Anwar M. Azam (Complainant) v. Nestle Enterprises Limited, Breweries Malt and Soft Drink Workers Local 304 (Respondents) (Dismissed)
- 2363-91-U: Canadian Union of Public Employees (Complainant) v. Third Sector Recycling (Respondent) (Withdrawn)
- **2367-91-U:** International Brotherhood of Electrical Workers, Local 804 (Complainant) v. 742967 Ontario Inc. c.o.b. as MCS Electrical (Respondent) (*Granted*)
- 2397-91-U: United Steelworkers Of America (Complainant) v. Valspar Inc. (Respondent) (Withdrawn)
- **2404-91-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. Western Inventory Services Limited (Respondent) (*Withdrawn*)
- **2411-91-U:** Angello Malamas (Complainant) v. Hotel Employees Restaurant Employees Union Local 75 (Respondent) (*Withdrawn*)

- **2421-91-U:** Debora Parsons (Complainant) v. (SEIU) Service Employees International Union (Respondent) v. Ballycliffe Lodge Ltd. (Carol McIlveen, Administrator) (Intervener) (*Withdrawn*)
- **2428-91-U:** Tony Szep (Complainant) v. Julia Fagan (President C.U.P.E. Local 1033) and Randy Wilson (Director of Personnel) St. Joseph's Hospital (Respondents) (*Withdrawn*)
- 2450-91-U: Marguerite Sirard (Complainant) v. Montebello Metal ou Packaging (Respondent) (Dismissed)
- 2452-91-U: London and District Service Workers' Union, Local 220, (Complainant) v. Cedarwood Village (Respondent) (Withdrawn)
- **2453-91-U:** Metropolitan Toronto Sewer and Watermain Contractors Association (Complainant) v. Arnott Construction Ltd., Labourers' International Union of North America, Ontario Provincial District Council and its affiliated Local Union Labourers' International Union of North America, Local 183, Labourers International Union Of North America, Local 183 (Respondents) (*Withdrawn*)
- **2459-91-U:** Amalgamated Clothing and Textile Workers Union (Complainant) v. Premier Wire Ltd. (Respondent) (*Withdrawn*)
- **2492-91-U:** Canadian Union Of Public Employees (Complainant) v. Third Sector Recycling (Respondent) (Withdrawn)
- **2503-91-U:** Office and Professional Employees International Union, Local 327 (Complainant) v. The Board of Health, Northwestern Health Unit (Respondent) (*Withdrawn*)
- **2575-91-U:** United Food and Commercial Workers International Union and United Food and Commercial Workers International Union, Local 1977 (Complainants) v. LOEB IGA Preston (Respondent) (*Withdrawn*)
- **2589-91-U:** Communications And Electrical Workers Of Canada (Complainant) v. First Choice Answering Service Inc., Gordon Mayhew, Triple A Answering Service Ltd. (Respondents) (*Withdrawn*)
- **2594-91-U:** National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Hyundai Auto Canada Inc. (Respondent) (*Dismissed*)
- **2630-91-U:** Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Complainant) v. Stanley Acmetrack Limited (Respondent) (*Withdrawn*)
- **2681-91-U:** Azariah Griffiths (Complainant) v. Sheet Metal Workers International Union, Local 2030 (Respondent) (*Dismissed*)
- 2715-91-U: John Cerniuk (Complainant) v. St. Joseph's Hospital (Respondent) (Dismissed)

APPLICATIONS FOR RELIGIOUS EXEMPTION

1619-91-M: Dale Wm. Gilchrist (Applicant) v. Canadian Union of Public Employees, The Corporation of the City of Sudbury (Respondents) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2583-91-M: Glove Reconditioners, a division of Canadian Linen Supply Co. Ltd., (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

FINANCIAL STATEMENT

1402-91-M: Leonard Menard (Complainant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647 Union (Respondent) (Withdrawn)

2243-91-M: Christina Chambers (Complainant) v. C.U.P.E. Local 181, Executives (Respondent) (Withdrawn)

2451-91-M: Walter Kelly (Complainant) v. International Union of Operating Engineers, Local 796 (Respondent) (*Withdrawn*)

JURISDICTIONAL DISPUTES

3060-89-JD: United Brotherhood of Carpenters & Joiners of America, Local 38 (Complainant) v. Peter Kiewit Sons Co. Ltd., Labourers' International Union of North America, Local 837 and Labourers Ontario Provincial District Council (Respondents) (*Withdrawn*)

2105-91-JD: Ontario Sheet Metal Workers' and Roofers' Conference, Sheet Metal Workers' International Association, Local 30 (Complainant) v. The Electrical Power Systems Construction Association, C.A. Tedesco Waterproofing, Operative Plasterers' and Cement Masons', Local 598 (Respondents) (Withdrawn)

2124-91-JD: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 221 (Complainant) v. Robert Laframboise Mechanical Ltd. and, Sheet Metal Workers' International Association, Local 269 (Respondents) v. Ontario Sheet Metal and Air Handling Group (Intervener) (Dismissed)

2224-91-JD: Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America (Complainant) v. Sheet Metal Workers International Association, Local 392, The Electrical Power Systems Construction Association, E Z Line Construction Ltd. (#882967 Ontario Ltd.), Labourers International Union of North America, Local 597 (Respondents) (Withdrawn)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2755-90-M: Ontario Public Service Employees Union (Applicant) v. Grand River Conservation Authority (Respondent) (Dismissed)

3460-90-M: Clifford John Sanderson (Applicant) v. United Steelworkers of America, Local 2251 (Respondent) (*Withdrawn*)

1250-91-M: Canadian Union of Public Employees (Applicant) v. Perth District Health Unit (Respondent) (Withdrawn)

1825-91-M: The Association of Allied Health Professionals: Ontario (Applicant) v. Peterborough Civic Hospital (Respondent) (*Withdrawn*)

1998-91-M: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Pickering Hydro Electric Commission (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

3159-90-OH: Howard S. Buchin (Complainant) v. The Municipality of Metropolitan Toronto (Respondent) (Dismissed)

0822-91-OH: Edmond Ferdinand (Complainant) v. St. Lawrence Cement Inc. (Respondent) (Withdrawn)

- 1811-91-OH: Simon Chung (Complainant) v. Goldfan Holdings Limited (Respondent) (Dismissed)
- 2260-91-OH: Marcel Noseworthy (Complainant) v. Len Millar, David Inman (Respondents) (Withdrawn)
- 2472-91-OH: Joyce T Caughey (Complainant) v. Madawaska Hardwood Flooring (Respondent) (Withdrawn)

CONSTRUCTION INDUSTRY GRIEVANCES

- 0617-89-G: United Brotherhood of Carpenters & Joiners of America, Local 38 (Applicant) v. 500869 Ontario Inc. c.o.b. as Duntri Construction (Respondent) v. Labourers International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 837 (Intervener) (Withdrawn)
- **1647-89-G:** Ontario Provincial Conference, International Union of Bricklayers and Allied Craftsmen, International Union of Bricklayers and Allied Craftsmen, Local 12 (Applicants) v. Cooper Corporation Limited, Versa Care Development Corporation (Respondents) (*Granted*)
- **1649-89-G:** Labourers' International Union Of North America, Local 1059 (Applicant) v. Cooper Corporation Limited, Versa Care Development Corporation (Respondents) (*Granted*)
- **1690-89-G:** United Brotherhood Of Carpenters & Joiners Of America, Local Union 2222 (Applicant) v. Cooper Corporation Limited, Versa Care Development Corporation (Respondents) (*Granted*)
- **2613-90-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, on its own behalf on behalf of its Local Union 463 (Applicant) v. Electrical Power Systems Construction Association, Ontario Hydro (Respondents) (*Withdrawn*)
- **0272-91-G:** United Brotherhood of Carpenters and Joiners of America Local, Union 2041 (Applicant) v. J.R. Noel Plastering Ltd. (Respondent) (*Withdrawn*)
- **0418-91-G:** International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Electrical Power Systems Construction Association, Ontario Hydro (Respondents) (*Granted*)
- **0654-91-G:** Canron Inc. (Applicant) v. International Association of Bridge, Structural and Ornamental Ironworkers Local 786, International Association of Bridge, Structural and Ornamental Ironworkers, and Ironworkers District Council of Ontario, Daniel Girard, and Douglas Rollins (Respondents) (*Withdrawn*)
- **0926-91-G:** International Brotherhood of Electrical Workers, Local 1788 (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Granted*)
- 1086-91-G: Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. New Generation Drywall Ltd. (Respondent) (*Granted*)
- **1244-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. PCL Constructors Eastern Inc. (Respondent) (*Withdrawn*)
- **1419-91-G:** Labourers' International Union of North America, Local 1036 (Applicant) v. Ellis Don Limited (Respondent) (*Withdrawn*)
- 1432-91-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ideal Railings Ltd. (Respondent) (Granted)
- **1481-91-G:** Labourers' International Union of North America, Local 607 (Applicant) v. Construction Forming Systems (Respondent) (*Withdrawn*)

- 1537-91-G; 1538-91-G; 1586-91-G: Labourers' International Union of North America, Local 506 (Applicant) v. Novo Mundo Construction Ltd. (Respondent) (*Granted*)
- **1626-91-G:** International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Electrical Power Systems Construction Association, and E-Z Line Construction (Respondents) (*Granted*)
- 1723-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Warren Bitulithic Ltd. (Respondent) (Withdrawn)
- 1787-91-G: International Union of Bricklayers and Allied Craftsmen, Local 12 (Applicant) v. A. Gorgi Masonry (1976) Ltd., Gorgi Construction Ltd. (Respondents) (Withdrawn)
- 1957-91-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 599 (Applicant) v. West York Construction (1984) Limited and Mechanical Contractors Association, Barrie Zone 10 (Respondents) (Withdrawn)
- 1993-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. Targa Limited (Respondent) (Withdrawn)
- 1999-91-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Siding IPE Limited (Respondent) (Withdrawn)
- **2115-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Canron Inc., Eastern Structural Division (Respondents) (*Granted*)
- **2192-91-G:** Sheet Metal Workers' International Association, Local 30 (Applicant) v. West York Construction (1984) Limited (Respondent) (*Withdrawn*)
- 2277-91-G: International Brotherhood of Electrical Workers, Local 1739 (Applicant) v. West York Construction (1984) Limited, The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario (Respondents) (Withdrawn)
- **2288-91-G:** IBEW Electrical Power Systems Construction Council of Ontario (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondent) (*Dismissed*)
- **2291-91-G:** International Union of Elevator Constructors, Local 96 (Applicant) v. Montgomery Kone Elevator Co. Limited (Respondent) (*Withdrawn*)
- **2314-91-G:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. J & T Caulking and Sealing Corp. (Respondent) (*Withdrawn*)
- 2347-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. E.S. Fox Limited (Respondent) (Withdrawn)
- **2348-91-G:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Eldan Electric Company Limited (Respondent) (*Granted*)
- 2355-91-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ontario Chalkboard Installation (Respondent) (Withdrawn)
- **2376-91-G:** Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Lay-All Drywall Ltd. (Respondent) (*Granted*)
- 2377-91-G: Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Malvern Drywall Systems Ltd. (Respondent) (*Granted*)

- **2381-91-G:** Labourers International Union of North America, Local 607 (Applicant) v. Construction Forming Systems (Respondent) (*Withdrawn*)
- 2394-91-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Canshare Cabling Inc. (Respondent) (Granted)
- 2399-91-G: Labourers International Union of North America, Local 506 (Applicant) v. Novo Mundo Construction Ltd. (Respondent) (Granted)
- **2412-91-G:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Novo Mundo Construction Ltd. (Respondent) (*Granted*)
- **2414-91-G:** IBEW Electrical Power Systems Construction Council of Ontario and International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)
- **2417-91-G:** IBEW Construction Council of Ontario and Local Union 1687 and Tim Butler and Paul Belair (Applicants) v. Corbett Electric Limited (Respondent) (*Granted*)
- **2425-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Bermingham Construction Ltd. (Respondent) (*Withdrawn*)
- **2433-91-G:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Symetrical Drywall Interiors Ltd. (Respondent) (*Granted*)
- **2434-91-G:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Stor-Com Contracting & Woodworking Ltd. (Respondent) (*Granted*)
- **2440-91-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Orta Forming Construction Ltd. (Respondent) (*Granted*)
- **2455-91-G:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. 948641 Ontario Limited c.o.b. J.C. Electrical (Respondent) (*Granted*)
- **2475-91-G:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Babcock & Bradley Contractors (Respondent) (*Withdrawn*)
- **2487-91-G:** International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721 (Applicant) v. Reis Rebar 845761 Ontario Inc. (Respondent) (*Withdrawn*)
- **2488-91-G:** International Brotherhood of Painters and Allied Trades Local 1824 (Applicant) v. C.H. Heist Ltd. (Respondent) (*Withdrawn*)
- **2493-91-G:** Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Lido Drywall Inc. (Respondent) (*Withdrawn*)
- **2498-91-G:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen Local 28 (Applicant) v. A. Corsi Masonry Ltd. (Respondent) (*Withdrawn*)
- **2504-91-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. J. P. Fournier and Confastec Inc. (Respondents) (*Granted*)
- **2510-91-G:** Labourers' International Union of North America, Local 183 (Applicant) v. C. T. Drain Construction Ltd. (Respondent) (*Withdrawn*)
- 2513-91-G: Construction Workers Local 53, CLAC (Applicant) v. Intrepid General Limited (Respondent) (Withdrawn)

- 2521-91-G: Labourers' International Union of North America, Local 837 (Applicant) v. Mountainview Excavating Inc. (Respondent) (*Granted*)
- **2524-91-G:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Classic Marble & Tile (Respondent) (*Withdrawn*)
- **2530-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Serit Construction Ltd. (Respondent) (*Granted*)
- **2531-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Twinborn Construction (Paving) Ltd. (Respondent) (*Granted*)
- 2543-91-G: Construction Workers Local 6, affiliated with the Christian Labour Association of Canada (Applicant) v. Allan Michaels Electric Ltd. (Respondent) (Withdrawn)
- **2544-91-G:** International Brotherhood of Painters and Allied Trades Local 1795 Glaziers (Applicant) v. A.F.G. Glass Centre (Respondent) (*Withdrawn*)
- **2545-91-G:** International Brotherhood of Painters and Allied Trades Local 1795 (Applicant) v. Barton Glass Inc. (Respondent) (*Withdrawn*)
- **2548-91-G:** International Brotherhood of Painters and Allied Trades Local 1795 Glaziers (Applicant) v. Whyte Glass Ltd. (Respondent) (*Granted*)
- **2549-91-G:** International Brotherhood of Painters and Allied Trades Local 1795 Glaziers (Applicant) v. St. Catharines Glass & Mirror Ltd. (Respondent) (*Granted*)
- 2558-91-G: Local 787 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Metric Air Systems (Ontario) Limited, Metric Air Systems Limited, M.A.S. Mechanical Ltd. (Respondents) (*Granted*)
- 2559-91-G: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Ontario Washroom Equipment Ltd. (Respondent) (Withdrawn)
- **2570-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Canadian Conduit & Cable Constructors Inc. (Respondent) (*Withdrawn*)
- 2572-91-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. J & T Caulking and Sealing Corp. (Respondent) (*Granted*)
- **2579-91-G:** Labourers International Union of North America, Local 506 (Applicant) v. Beer Precast Concrete Limited (Respondent) (*Withdrawn*)
- **2586-91-G:** Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bel Drywall (Respondent) (*Withdrawn*)
- **2598-91-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Jen-Dan Limited (Respondent) (*Withdrawn*)
- **2616-91-G:** Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Abreu Contractors Ltd. (Respondent) (*Withdrawn*)
- **2624-91-G:** International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Pacer Panel Systems Inc. (Respondent) (*Withdrawn*)
- **2628-91-**G; **2629-91-**G: United Brotherhood of Carpenters and Joiners of America Local Union 1669 (Applicant) v. M & L Contracting (Respondent) (*Withdrawn*)

- **2646-91-G:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. G.C. Tech Electrical (Respondent) (*Granted*)
- 2653-91-G: International Union of Operating Engineers, Local 793 (Applicant) v. 582242 Ontario Limited c.o.b. as Sierra Landscaping (Respondent) (*Granted*)
- 2660-91-G: Labourers International Union of North America, Local 506 (Applicant) v. Allen-Burke Contractors (Respondent) (Granted)
- **2663-91-G**: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Devon Structural Ltd. (Respondent) (*Granted*)
- 2666-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Maincrest Contracting Ltd. (Respondent) (Withdrawn)
- 2687-91-G: Labourers' International Union of North America, Local 506 (Applicant) v. Four Seasons Drywall Systems & Acoustics (Respondent) (Withdrawn)
- **2698-91-G:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Westlake Electrical Contractors Limited (Respondent) (*Granted*)
- 2708-91-G: Construction Workers Local 53, CLAC (Applicant) v. Rauth Roofing Limited (Respondent) (Withdrawn)
- 2750-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Sage Landscaping Ltd. (Respondent) (Withdrawn)
- 2751-91-G: Labourers' International Union of North America, Local 183 (Applicant) v. Woods Johnson & Associated Inc. (Respondent) (Withdrawn)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

- **2708-90-R:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Polytech Coatings Ltd. (Respondent) v. Group of Employees (Objectors) (*Dismissed*)
- 1126-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Trafico Masonry Ltd. (Respondent) v. International Union of Bricklayers and Allied Craftsmen, Local 2 Ontario (Intervener) (Dismissed)
- **1250-91-M:** Canadian Union of Public Employees, Local 3308 (Applicant) v. Perth District Health Unit (Respondent) (*Withdrawn*)
- **1415-91-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 666 (Applicant) v. 842699 Ontario Limited o/a Dayboll and Young Plumbing and Heating (Respondent) (*Dismissed*)
- **1578-91-G:** Sheet Metal Workers' International Association, Local 539 (Applicant) v. The Electrical Power Systems Construction Association, Doug Chalmers Construction Ltd. (Respondents) v. United Brotherhood of Carpenters & Joiners of America, Local 1256 (Intervener) (*Dismissed*)
- 1982-91-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Provincial Services (Respondent) (Dismissed)
- **2077-91-R:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Nu-West Hardwood (Respondent) (*Granted*)

2117-91-U: Kermit Mitchell (Applicant) v. Ontario Hydro (Respondent) (Dismissed)

Ontario Labour Relations Board, 400 University Avenue, Toronto, Ontario M7A 1V4





